SETTLING DISPUTES WITH THE DEPARTMENT OF LABOR

THE YEAR IN EMPLOYEE BENEFITS: INSIGHTS AND STRATEGIES FOR RETIREMENT, HEALTH, AND EXECUTIVE COMPENSATION

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## TABLE OF CONTENTS

I. **INTRODUCTION AND BACKGROUND** ................................................................. 1

II. **DO YOU REALLY WANT TO SETTLE?** ......................................................... 1

   Prohibited Transaction Exemption: PTE 94-71 ...................................................... 6

III. **SETTLING LITIGATION BROUGHT BY THE DEPARTMENT OF LABOR** ..... 7

   Section 502(l) Redux ........................................................................................... 8

   Indemnification Complications ............................................................................. 9

   Prohibited Transaction Exemption: PTE 79-15 ..................................................... 13

IV. **PROHIBITED TRANSACTION EXEMPTIONS WHEN NOT SETTLING WITH DOL** .............................................................................................................. 13

   Prohibited Transaction Exemption: PTE 2003-39 ............................................... 14

   Is a Release of Claims Against a Party in Interest a Prohibited Transaction? ........ 14

V. **WHETHER TO USE VFCP (IF NOT UNDER DOL INVESTIGATION)** ........... 18

   Covered Transactions Eligible for VFCP ................................................................ 20

   Transactions Eligible for PTE 2002-51 .................................................................. 20

VI. **MISCELLANEA CONCERNING SETTLING WITH PARTIES OTHER THAN DOL** ............................................................................................................... 27

   Settling Litigation, Particularly Class Action Litigation .......................................... 27

   Plan as Plaintiff in Class Action Litigation .............................................................. 28

VII. **EBSA WEBSITE EXCERPTS** ..................................................................... 30

   A. Enforcement Manual, Chapter 10, on “Investigative Authority” ....................... 32

   B. Enforcement Manual, Chapter 12, on “Relationship With The IRS” ............. 34

   C. EBSA website page on “ERISA Enforcement” ............................................... 38

   D. Fact Sheet entitled “EBSA Restores Over $599.7 Million to Employee Benefit Plans, Participants and Beneficiaries” .................................................. 41

   E. EBSA’s page on “Freedom of Information Act” ............................................. 44

   F. Enforcement Manual, Chapter 20, on “Release of Information” ...................... 45
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I. Introduction and Background. I will offer in this outline some thoughts about settling disputes with the Department of Labor concerning employee benefit plans. Before getting to those comments, let me note that the website for the Department of Labor’s Employee Benefits Security Administration (“EBSA”) includes a good amount of information about how EBSA goes about its work in enforcing the Employee Retirement Income Security Act of 1974 (“ERISA”). Notably, this includes EBSA’s “Enforcement Manual.” At the end of this outline, in Section VII, you will find some excerpts from the EBSA website (www.dol.gov/ebsa) that provide background on EBSA’s authority, its approach in enforcing ERISA, and its recent activities.

II. Do You Really Want to Settle? Let’s say the Department of Labor (the “DOL”) has sent a letter indicating that it believes plan fiduciaries have violated their fiduciary duties under ERISA, or that the Department has identified what it considers to be other violations of ERISA. And let’s say the fiduciaries, plan sponsor, or others who are in a position to take remedial action are willing to take corrective steps they believe would satisfy the Department of Labor. (The party taking this remedial action may believe it will satisfy the DOL either because there is an obvious correction, or because the DOL investigator or auditor has suggested informally what the proper correction might be.) The question, then, is whether it makes sense to seek to enter into a formal settlement agreement with the DOL to resolve the matter.

Where the matter involves allegations of a breach of fiduciary duty, in many cases it will not make sense to enter into a formal settlement agreement with the DOL. That is because entering into a settlement agreement will likely increase the cost of correction by roughly 20 percent. Why would that be? It is because when a fiduciary enters into a settlement agreement with the DOL, the ERISA Section 502(l) 20 percent penalty applies. In contrast, where a fiduciary has good reason to believe the remedial action the fiduciary intends to take will satisfy the DOL, the Section 502(l) penalty can typically be avoided by taking the remedial action, informing the Department of Labor that the fiduciary has done so (or intends to do so), and accepting the risk that the DOL will not find the correction adequate (which the fiduciary has, presumably, already concluded is a relatively small risk).

Why does the Section 502(l) penalty apply in the case of a settlement, but not if there is no settlement agreement, even where a fiduciary breach has occurred? The answer lies in the particulars of the statutory provision’s definition of the term “applicable recovery amount.” Before explaining further, let’s look at the text of Section 502(l) in toto.
Section 502(l) provides as follows:

(i) Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle [Subtitle B, which comprises Parts 1 through 7 of Title I] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term “applicable recovery amount” means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary’s sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

Okay. If we start with subsection (1), we see that although Section 502(l)(1) indicates that the Secretary of Labor shall assess a civil penalty in the case of a breach of fiduciary responsibility or knowing participation in a breach, the amount of the penalty is 20 percent of the “applicable recovery amount.” It is in the definition of the term “applicable recovery amount” that a distinction is made between fiduciary breaches that are the subject of a settlement agreement or court order, and those where there is no such settlement agreement or court order. Specifically, Section 502(l)(2) says the term “applicable recovery amount” means the amount recovered from the fiduciary (or other person) with respect to the breach (or other violation by the fiduciary of Part 4 of Title I) (a) “pursuant to any settlement agreement” with the Secretary of Labor, or (b) with respect to amounts a court ordered be
paid by the fiduciary (or other person) to the plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary of Labor.

The materials on the EBSA website are consistent with this. In Chapter 35 of the Enforcement Manual, concerning “Civil Penalties” (portions of which are reproduced in Section VII.K below), the EBSA indicates, in Section 2.b., that a notice of assessment of the 20 percent penalty is to be served “subsequent to the payment of the applicable recovery amount pursuant to either a settlement agreement or a court order.” (Emphasis added.) And as to what constitutes a settlement agreement, the “Voluntary Compliance Guidelines” posted on the EBSA website as Chapter 34 of the Enforcement Manual (portions of which are reproduced in Section VII.J below) provides, in Section 11, as follows:

A settlement agreement, pursuant to the Department's proposed regulation 29 CFR 2560.502l-1(e), is defined as an agreement between the Secretary and a person who the Secretary [of Labor] alleges to have committed a breach of fiduciary responsibility under, or other violation of any provision of, part 4 of Title I of ERISA pursuant to which a claim for such breach or violation is to be released by the Secretary in return for cash or other property being tendered to a plan, any participant or beneficiary of a plan, or the legal representative(s) of a plan or plan participant or beneficiary.

Settlement Agreement No. 1 (Figure 6) provides a written acknowledgement of both the agreed-upon correction amount and the amount of the 502(l) penalty to be assessed. Settlement Agreement No. 2 (Figure 7) also sets forth the agreed-upon correction amount, but preserves the right of the violator to contest the assessment of the 502(l) penalty and to petition the Secretary for a waiver or reduction of the civil penalty.

The quoted material above refers to “Settlement Agreement No. 1” and “Settlement Agreement No. 2.” Here they are:

**Settlement Agreement No. 1**

This Agreement, entered into by and between the United States Department of Labor, Employee Benefits Security Administration (EBSA) and ____________________, shall fully and finally resolve and settle the issues between the parties that were raised by EBSA in its letter to ____________________ dated ________________ and which are set forth as follows:

(Briefly describe issues.)

Whereas, in connection with this Agreement, ____________________ has agreed to pay $X to the ____________________ Plan (the plan);

Whereas, EBSA is required to assess a civil penalty of twenty percent (20%) on amounts recovered under a settlement agreement or court order
("applicable recovery amount"), pursuant to ERISA section 502(l)(2), 29 U.S.C. section 1132(l)(2);

Whereas, EBSA has determined that the applicable recovery amount within the meaning of ERISA section 502(l), 29 U.S.C. section 1132(l) is $Y;

Whereas, this Agreement is not binding on any governmental agency other than the United States Department of Labor.

Therefore, in consideration of these mutual undertakings and understandings, EBSA and ____________________ agree as follows:

1. ____________________ shall, within ________________ days of the signing of this Agreement, pay $X to the Plan.

2. Upon payment of $X to the Plan pursuant to this Agreement EBSA will assess a penalty of twenty percent (20%) of the applicable recovery amount, pursuant to ERISA section 502(l)(2), 29 U.S.C. section 1132(l)(2); said penalty amount to be paid will be $Y, which represents 20% of the portion of the applicable recovery amount.

3. Within ten (10) days of receipt of EBSA’s assessment letter, ____________________ shall pay said penalty as directed in the letter from EBSA’s authorized representative.

4. (Other relief, if any, agreed to between the parties.)

5. Each of the signatories below hereby represents that he or she is authorized and entitled to sign on behalf of each of the parties hereto.

Dated this ________________ day of ________________ , 20__.

For

By:

For: The United States Department of Labor, Employee Benefits Security Administration

By:

Regional Director

**Settlement Agreement No. 2**

This Agreement, entered into by and between the United States Department of Labor, Employee Benefits Security Administration (EBSA), and
______________, with the exception of issues concerning the assessment of a civil penalty under ERISA section 502(l), 29 U.S.C. section 1132(l), shall fully and finally resolve and settle the issues between the parties that were raised by EBSA in its letter to ________________, dated ________________, and which are set forth as follows:

(Briefly describe issues.)

Whereas, in connection with this Agreement, ____________________ has agreed to pay $X to the ________________ Plan (the Plan);

Whereas, EBSA maintains that it is required to assess a civil penalty of twenty percent (20%) on amounts recovered under a settlement agreement or court order ("applicable recovery amount"), pursuant to ERISA section 502(l)(2), 29 U.S.C. section 1132(l)(2);

Whereas, ____________________ reserves all rights to contest the assessment and calculation of the civil penalty under ERISA section 502(l), 29 U.S.C. section 1132(l), and to petition the Secretary of Labor for a waiver or reduction of the civil penalty;

Whereas, this Agreement is not binding on any governmental agency other than the United States Department of Labor.

Therefore, in consideration of these mutual undertakings and understandings, EBSA and ____________________ agree as follows:

1. ________________ shall, within ________________ days of the signing of this Agreement, pay $X to the Plan.

2. Each of the signatories below hereby represents that he or she is authorized and entitled to sign on behalf of each of the parties hereto.

Dated this ________________ day of , 20 ________________.

For

By:

For: The United States Department of Labor, Employee Benefit Security Administration

By:

Regional Director

In the website materials just quoted, concerning settlement agreements, the EBSA refers to a proposed regulation 29 CFR Section 2560.502l-1(e). That regulation is found at 55 Fed. Reg. 25,288 (June 20, 1990). This proposed regulation is entirely consistent with the
notion that the 20 percent penalty applies only where there has been a settlement agreement with the DOL or a court order resulting from a judicial proceeding instituted by the DOL under ERISA Section 502(a)(2) or (a)(5).

**Prohibited Transaction Exemption: PTE 94-71.** In some cases it may be necessary to enter into a settlement agreement with the DOL, even though the risk the DOL would object to the corrective action is low. That will be the case where the remedial action itself would constitute a prohibited transaction, and the fiduciary or other parties want to take advantage of prohibited transaction class exemption PTE 94-71. PTE 94-71 permits otherwise prohibited transactions or activities that are authorized in advance by a settlement agreement resulting from a DOL investigation of an employee benefit plan. The exemption applies only if (a) the nature of the transaction or activity is specifically described in writing, by the terms of the settlement agreement, (b) the DOL is a party to the settlement agreement, (c) a party who will be engaging in the transaction or activity has provided written notice to the affected participants and beneficiaries in a manner reasonably calculated to result in the receipt of that notice at least 30 days prior to entry into the settlement agreement, (d) a copy of the notice and method of distribution is approved in advance by the area or district director of the DOL which negotiated the settlement, and (e) the notice includes an objective description of the transaction or activity, the approximate date on which the transaction will occur, the address of the area or district office of the DOL which negotiated the settlement agreement, and a statement apprising participants and beneficiaries of their right to forward their comments to that office.

The preamble to the proposed exemption (that is, PTE 94-71 as initially proposed), found at 59 Fed. Reg. 27581 (May 27, 1994), offers three examples illustrating the types of transactions that could arise in the context of settlement discussions that would require a prohibited transaction exemption. All three of these transactions (correcting alleged Title I violations) concern either the plan sponsor purchasing property from a plan or a fiduciary purchasing a note from a plan. Here are the three examples:

*Example (1).* A plan purchased a building comprising 60 percent of the plan’s assets. Following an investigation of the plan, the Department notifies the responsible plan fiduciary that such transaction appears to violate several provisions of ERISA. As part of the settlement agreement, the Department and the fiduciary agree that the plan sponsor will purchase the building from the plan, and will reimburse the plan for any losses which may have accrued up to the date of the sale.

*Example (2).* Upon investigation of a plan, the Department discovers that the plan owns a promissory note evidencing a loan to a company wholly owned by the plan fiduciary. At the conclusion of its investigation, the Department notifies the plan fiduciary that such transaction violates the restrictions contained in section 406 of ERISA. The plan fiduciary and the Department agree to settle the matter without resort to litigation. As part of the settlement, the plan fiduciary will purchase the note from the plan for
the greater of fair market value or the outstanding balance of the loan plus accrued interest.

Example (3). In 1991, a plan’s fiduciaries invested a significant percentage of plan assets in a Real Estate Investment Trust (REIT) without a proper investigation of the investment merits of the transaction. Following receipt of a complaint from a participant of the plan, the Department contacts the plan’s fiduciaries and discovers that the value of the plan’s investment in the REIT has declined since its acquisition and is now less than 50 percent of the amount of the plan’s original investment. The Department informed the fiduciaries that they breached their fiduciary responsibilities under ERISA by investing plan assets in the REIT. The Department agrees to settle the matter without resort to litigation by among other things, accepting the plan sponsor’s offer to purchase the plan’s interest in the REIT and to reimburse the plan for any losses which the plan has suffered during its investment in the REIT.

PTE 94-71 provides an exemption from ERISA Sections 406(a)(1)(A) through (D), 406(a)(2), 406(b)(1), and 406(b)(2), as well as the taxes imposed by IRC Sections 4975(a) and 4975(b), by reason of IRC Section 4975(c)(1)(A) through (E).

Note that EBSA, in Chapter 34 of its Enforcement Manual on “Voluntary Compliance Guidelines,” indicates that where the time for a proposed correction of violations would exceed a one year, this will generally not be considered an appropriate case for voluntary compliance, unless approved in advance by the Office of Enforcement/Division of Field Operations. This presumably means that in settling matters resulting from an investigation (and before a lawsuit has been filed), the DOL will generally be resistant to corrections that will take more than one year to complete. See paragraph V.A of Section VII.J below for the relevant provision from EBSA’s Enforcement Manual.

III. Settling Litigation Brought by the Department of Labor. In settling a civil lawsuit brought by the Department of Labor, the DOL will generally require that the settlement agreement take the form of a consent decree. The DOL will usually insist on the right to issue a press release. And, of course, the Section 502(l) penalty will apply to the “applicable recovery amount.”

One of the points of contention may be how the consent order and any related press release will address whether the defendants in fact breached their fiduciary duties or otherwise violated ERISA. The defendants will, of course, want to reflect in the settlement their position that they deny they engaged in any wrongdoing. The DOL may push for language saying the defendants “neither admit nor deny” liability. Assuming the defendants object to the “nor deny” portion this formulation, it is possible the defendants and DOL could agree instead to language under which the settlement is not to be deemed or considered an admission of wrongdoing by the defendants (without the “nor deny” language). Less appealingly, the settlement might be silent altogether on whether, in fact, the defendants are liable.
Note that it appears EBSA’s policy has been not to agree to language in consent judgments or settlements wherein liability is denied by the defendants. See Chao v. Employers Resource Management Co., Inc., Case No. 1:02-CV-00012-ELG-MHW (D. Idaho Feb. 3, 2006) (Report and Recommendation by Magistrate Judge Williams) (“[t]he Secretary . . . asserts that . . . [EBSA] has a policy of not agreeing to language in consent judgments or settlements wherein liability is denied by defendants.”). Id. at p. 6.

Section 502(l) Redux. If defendants admit liability in a settlement agreement that will result in a consent order, the 20 percent penalty under Section 502(l) would seem to be mandatory. That is because the amount recovered from the fiduciary (or other person who knowingly participated in a fiduciary breach or other violation of Part 4 of Title I of ERISA) will constitute an “applicable recovery amount” within the meaning of Section 502(l). It will constitute an “applicable recovery amount” for two reasons. First, the amount will be recovered pursuant to a settlement agreement with the DOL. Second, it will effectively be ordered by a court, upon approval of the consent order (this assumes the order requires the fiduciary (or other person) to pay amounts to a plan or its participants and beneficiaries in a proceeding instituted by the DOL under ERISA Section 502(a)(2) or (a)(5)).

The DOL does have the discretion to waive or reduce the Section 502(l) penalty, if it determines in writing that the fiduciary (or other person) acted reasonably and in good faith, or it is reasonable to expect that the fiduciary (or other person) will not be able to restore all losses to the plan without severe financial hardship unless a waiver or reduction is granted. This is under ERISA Section 502(l)(3). One presumes that in most circumstances in which the DOL has brought litigation it is not going to agree to a determination that the fiduciary (or other person) acted reasonably and in good faith. In some circumstances, though, the DOL might acknowledge severe financial hardship justifying waiver or reduction of the penalty. If there is to be paid a Section 502(l) penalty, or a prohibited transaction penalty under ERISA Section 502(i) or excise tax under IRS Section 4975, the fiduciary should understand whether any available fiduciary liability insurance policy excludes coverage for civil penalties or excise taxes.

Where defendants do not expressly admit liability in a settlement agreement, there is authority for the proposition that the Section 502(l) penalty may not necessarily apply. Specifically, the Ninth Circuit, in Rodrigues v. Herman, 121 F.3d 1352, 1354 (9th Cir. 1997), considered application of the Section 502(l) penalty where, in a consent decree, the DOL reserved the right to assess the penalty with respect to amounts recovered under a settlement agreement. The DOL did, in fact, assess the penalty, in the amount of almost $33,000, and denied the defendant’s request for a waiver of the penalty. The DOL took the position that it need not, in assessing a Section 502(l) penalty, prove that there had been a breach of fiduciary duty when it had secured a settlement agreement, even if, in that settlement agreement, the party did not admit it had breached any duty. The court disagreed with the DOL’s assertion, but in the case at hand found that there had in fact been a breach of fiduciary duty supporting imposition of the penalty. The Ninth Circuit put it this way:

The Secretary argues that requiring it to prove a fiduciary breach would obviate any savings it gained by settling a case without a full-blown trial.
This argument assumes that a trial would be necessary to prove a fiduciary breach. When seeking to impose the penalty, however, the facts (already developed in the course of settlement negotiations) could establish a breach as a matter of law, as they do in this case. Alternatively, no trial would be required if the Secretary settled the case and required a sentence in the consent decree admitting a violation occurred.

And the Ninth Circuit acknowledged that defendants may settle lawsuits even where no breach has occurred, when it said the following in a footnote:

One can imagine a situation in which no breach occurred, but a fiduciary agreed to a settlement to avoid an expensive legal battle. Under the Secretary’s proposed reading, because of the enforceable settlement agreement, the fiduciary would be subject to an additional twenty percent penalty even though there was no violation.

As was the case in Rodrigues above, it is sometimes possible to settle without resolving with the DOL whether a Section 502(l) penalty will apply.

**Indemnification Complications.** The DOL has been fairly aggressive in asserting that an employer may not indemnify fiduciaries against claims of fiduciary breach concerning the employer’s ESOP or other plan holding a substantial interest in the employer’s stock. The DOL has, one assumes, been emboldened in this regard by a couple of cases from 2009, as well as more recent developments. This has included the DOL’s ability to negotiate settlements in which defendants have agreed not to seek to enforce the provisions of indemnification agreements favoring them. Below are a few examples of developments that raise a question about the permissibility of indemnification for fiduciary breaches where the plan holds stock of the employer/plan sponsor:

**Indemnification by Company Where ESOP Owns Substantial Interest.** The Ninth Circuit concluded that an ESOP-owned company was prohibited from indemnifying a fiduciary against claims of fiduciary breach. Johnson v. Couturier, 572 F.3d 1067, 47 EBC 1449 (9th Cir. 2009). The case concerned a company’s President who, together with his fellow directors, diverted almost $35 million of corporate assets – at least a third of the corporation’s value – to the President’s own possession through the buyout of deferred compensation agreements. The plaintiffs were participants in the company’s ESOP. They filed suit against the President and two other directors alleging, among other things, that the defendants had breached their fiduciary duties under ERISA in agreeing to compensate the President in this way. In response to the defendants’ argument that the setting of executive compensation is a business decision not subject to ERISA, the court held that ERISA Section 410(a) prohibited the company from indemnifying the defendants. It therefore upheld the district court’s injunction prohibiting the company from advancing defense costs to the President (and freezing the President’s assets). In so ruling, the court acknowledged that corporate assets may not be plan assets, but said in this case
the impact on plan participants of indemnifying the defendants would have been direct because the company was being liquidated. Since the company was being liquidated any proceeds taken from the company’s remaining funds to pay the defendants’ defense costs would, dollar-for-dollar, reduce the funds available for distribution to ESOP participants. That is, the advancement of fees to the defendants would be “tantamount to asking ESOP participants to pay for Defendants’ defense costs.”

In a later district court decision, the Northern District of California refused to enforce a company’s agreement to indemnify its ESOP trustee. As in Couturier, the court concluded that to do so would violate ERISA’s prohibition on the exculpation of fiduciaries (found in ERISA Section 410). Fernandez v. K-M Indus. Holding Co., Inc., 646 F.Supp.2d 1150, 48 EBC 1301 (N.D. Cal. 2009). In Fernandez, all the parties to ESOP fiduciary litigation other than the trustee had previously settled, and the plaintiffs agreed to forego any recovery from the trustee to the extent the company (or certain other defendants) was obligated to indemnify the trustee. The court refused to distinguish the Ninth Circuit’s holding in Couturier, where, recall, the Ninth Circuit held that a company’s agreement to indemnify its ESOP trustee was unenforceable. The court refused to distinguish Couturier even though in that case the company was in the process of liquidation, which presented a stronger argument for not allowing indemnification since there would have been a direct dollar-for-dollar reduction in the amounts received by ESOP participants for any dollars used in indemnifying the trustee. In contrast, in Fernandez the effect of indemnification on plan participants would have been more remote. In particular, in Fernandez the ESOP owned only 42 percent of the company, so other shareholders would have borne a portion of the cost of any indemnification.

Sierra Aluminum Company Settlement: Perez v. GreatBanc Trust Co. GreatBanc Trust Company entered into a settlement agreement with the Department of Labor in connection with fiduciary claims made by the DOL relating to the purchase by Sierra Aluminum Company’s ESOP of Sierra Aluminum Company stock. The settlement was approved by the federal district court for the Central District of California on June 2, 2014 (Case No. 5:12-CV-01648).

The settlement was notable because not only did it involve a payment by GreatBanc and its insurers of over $4.7 million to the Sierra ESOP, and a payment to the DOL of a Section 502(l) payment in the amount of over $477,000, the settlement also established a lengthy set of procedures that GreatBanc agreed to follow whenever serving as a trustee or other fiduciary of an ESOP (subject to Title I of ERISA) in connection with transactions in which the ESOP is purchasing or selling, is contemplating purchasing or selling, or receives an offer to purchase or sell, employer securities that are not publicly traded.

The DOL alleged that GreatBanc failed to adequately inquire into an appraisal that presented unrealistic and aggressively optimistic projections of Sierra’s future earnings and profitability. The DOL asserted that GreatBanc failed to investigate the credibility of the assumptions, factual bases, and adjustments to financial statements that went into the appraisal. And the DOL alleged that GreatBanc asked for a revised valuation opinion in order to reconcile the ESOP’s higher purchase price with the lower fair market value of the company stock.
As to the payment of over $4.7 million to the Sierra ESOP, the settlement agreement calls for GreatBanc’s insurers to pay $3.25 million of that amount, and for GreatBanc to pay the balance together with the Section 502(l) payment over a three-year period. Although Sierra and GreatBanc had an indemnification agreement under which Sierra may have been required to pay GreatBanc’s attorney’s fees, costs, and expenses incurred in connection with the DOL’s lawsuit and underlying investigation, as part of the settlement GreatBanc agreed not to seek or accept indemnification from the company or to use any assets of the company or the company’s ESOP for any payments to be made under the settlement agreement or for any expenses, including attorney’s fees, associated with the negotiation, consideration, documentation, or implementation of a settlement incurred after a particular date (which was May 20, 2014).

**Indemnification Agreements and Arbitration: Schafer v. Multiband Corp.** In an interesting opinion (though not recommended by the court for publication), the Sixth Circuit Court of Appeals refused to vacate an arbitrator’s decision that an indemnification agreement in favor of ESOP fiduciaries was invalid. *Schafer v. Multiband Corp.*, 551 Fed. Appx. 814 (6th Cir. 2014) (unpub.). The case involved a putative indemnification obligation of a company, Multiband Corp., that had purchased a holding company that maintained an ESOP. The holding company had been formed when four entities, some of which had themselves maintained ESOPs, exchanged their ownership interests for shares of stock in the holding company, and the holding company became the parent company of all four entities. The holding company then formed its own ESOP.

The dispute concerned two directors of the holding company who were also trustees of some of the ESOPs. The Department of Labor asserted that the trustees had breached their fiduciary duties by allowing various ESOPs to purchase company stock at inflated prices.

The DOL offered to settle the lawsuit for $42 million. Pursuant to the terms of indemnification agreements, the two trustees requested that Multiband which was the company that had purchased the holding company, indemnify them. Multiband refused. The DOL later filed suit against the trustees, and without admitting liability, the trustees agreed to pay $1.45 million each. The trustees again requested indemnification from Multiband, and Multiband refused to pay.

The two trustees filed an arbitration complaint against Multiband for its refusal to indemnify them (arbitration was required under the terms of the indemnification agreements). Multiband asserted that the agreements were void as against public policy under Section 410(a) of ERISA, which is the provision prohibiting exculpatory provisions. The arbitrator ruled in favor of Multiband and against the two former trustees, saying the indemnification agreements were invalid. Apparently the arbitrator, though acknowledging the permissibility of the purchase of fiduciary liability insurance, concluded that, at least in the context of ESOPs, indemnification agreements are not permitted.

The Sixth Circuit said the arbitrator’s holding was inconsistent with Sixth Circuit precedent, and that the “arbitrator’s decision would doubtless be reversed if it were a court decision under the precedent of this court, because the arbitrator’s reading of the relevant
section of ERISA is contrary to our precedent.” The court noted that the arbitrator had, however, cited some court decisions outside the Sixth Circuit where indemnity agreements had been invalidated “because they would have some sort of financial impact on the plan itself,” citing Johnson v. Couturier, 572 F.3d 1067, 1080 (9th Cir. 2009); Donovan v. Cunningham, 541 F. Supp. 276, 289 (S.D. Tex. 1982) rev’d in part on other grounds, 716 F.2d 1455 (5th Cir. 1983); and Fernandez v. K-M Indus. Holding Co., 646 F.Supp.2d 1150 (N.D. Cal. 2009) (all voiding agreements to indemnify ESOP fiduciaries as functionally equivalent to the plan’s indemnifying itself). But the court observed that the arbitrator made no finding that the indemnity in the instant case could adversely affect the interest of the victims of the trust violation. In fact, the company from which indemnification was sought was a purchaser of the holding company and effectively, as the court characterized it, “a third party stranger to the ESOP.” The arbitrator’s analysis was apparently not that the indemnity could adversely affect the interest of plan participants, but instead simply that reimbursement not clearly identified as “insurance” is not permitted under ERISA.

Even though the Sixth Circuit was clear that it thought the arbitrator’s decision was wrong, the court refused to vacate the arbitrator’s decision. It described the very narrow standards under which an arbitrator’s decision can be vacated under the Federal Arbitration Act (“FAA”). As the court put it:

When courts are called on to review an arbitrator’s decision, the review is very narrow; it is one of the narrowest standards of judicial review in all of American jurisprudence.

The court observed that it is not firmly settled whether a court can vacate an arbitrator’s award when the arbitrator’s decision is so clearly contrary to established law that it was in “manifest disregard” of the law. But even assuming that manifest disregard of the law is a basis for vacating an arbitrator’s decision, the Sixth Circuit said “manifest disregard of the law” requires more than the arbitrator making an error of law. Where an arbitrator relies on a “colorable meaning” of the words of the statute, as the Sixth Circuit said the arbitrator did in interpreting ERISA in the case at hand, court precedent to the contrary is not necessarily determinative. Court holdings bind courts and agencies whose decisions are appealable to those courts, but an arbitrator, though he or she cannot reject the law, can disagree with a court’s precedent without being considered to disregard the law.

**DOL Settlement: Overpayment for Stock and Indemnification by ESOP-Owned Company (People Care Holdings, Inc.)** The Department of Labor announced on January 22, 2014, a $10 million settlement agreement with People Care Holdings, Inc. and former owners who sold the company to their employees through creation of an ESOP. The DOL claimed that the company and two former owners breached their fiduciary duties by permitting the ESOP to purchase the company’s stock from the former owners for more than its fair market value. Specifically, the DOL claimed that the company and former owners breached their fiduciary duties by failing to correct unrealistically optimistic projections of the company’s future earnings and profitability, even after the company lost a key municipal contract. (The company is a home-care agency that provides caregiving services, such as meal preparation, laundry, shopping, housekeeping, companionship and
medical assistance, with facilities in New York and New Jersey. Its ESOP had approximately 4,655 participants.)

The DOL also claimed that the stock purchase agreement included an indemnification agreement that was invalid because it would require the company, which was entirely owned by the ESOP, to pay costs incurred by the selling shareholders in connection with any investigation or litigation.

Under the terms of the settlement agreement, the two former owners agreed to pay just over $9 million to the ESOP and a civil penalty of just over $900,000.

**Prohibited Transaction Exemption: PTE 79-15.** Note that a prohibited transaction class exemption, PTE 79-15, provides relief from the prohibited transaction rules for transactions or activities authorized or required by a federal district court order or a settlement approved by such a court, if the DOL or IRS was a party to the litigation. Specifically, PTE 79-15 provides as follows:

Sections 406 and 407(a) of the Act and section 4975(a) and (b) of the Code shall not apply with respect to any transaction or activity which is authorized or required, prior to the occurrence of such transaction or activity, by an order of a United States District Court or by a settlement of litigation approved by such a court, provided that the nature of such transaction or activity is specifically described in such order or settlement, and provided further that the Secretary of Labor or the Internal Revenue Service is a party to the litigation at the time of such order or settlement.

For purposes of this exemption, the terms “employee benefit plan” and “plan” refer to an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code.

**IV. Prohibited Transaction Exemptions When Not Settling With DOL.** As noted earlier, there are two prohibited transaction class exemptions that permit certain actions to be taken that would otherwise constitute prohibited transactions, if taken in connection with a settlement agreement with the Department of Labor (PTE 94-71) or are specifically authorized or required by a federal district court order (or a settlement decree approved by a federal district court) where the DOL or IRS was a party to the litigation at the time of the order or settlement (PTE 79-15). I have also noted above that in some circumstances a fiduciary or plan sponsor may wish to take remedial action in response to a DOL investigation without entering into a formal settlement agreement with the DOL, in an attempt to avoid application of the Section 502(l) 20 percent penalty. But what if that remedial action would involve a prohibited transaction, such as (a) a repayment of monies to the plan over time, which might constitute a prohibited extension of credit by the plan to a party in interest, (b) a service provider providing discounted services for a time, which might constitute a prohibited furnishing of services to the plan by a party in interest or perhaps an extension of credit by the plan, or (c) a purchase of plan assets by a party in interest? And of particular interest, what if the plan or a plan fiduciary will, in connection with resolution of a dispute, provide a release of claims against a defendant who is a party
in interest? As it turns out, there are a variety of exemptions that may provide relief in these circumstances, even if there is no formal settlement with the DOL making available PTE 94-71.

**Prohibited Transaction Exemption: PTE 2003-39.** As to releasing a plan’s claims against a party in interest in connection with the settlement of litigation, the DOL has issued a class exemption, PTE 2003-39, that applies if certain conditions are met, to exempt the following transactions:

(a) The release by the plan or a plan fiduciary of a legal or equitable claim against a party in interest in exchange for consideration, given by, or on behalf of, a party in interest to the plan in partial or complete settlement of the plan’s or the fiduciary’s claim.

(b) An extension of credit by a plan to a party in interest in connection with a settlement whereby the party in interest agrees to repay, over time, an amount owed to the plan in settlement of a legal or equitable claim by the plan or a plan fiduciary against the party in interest.

(c) The plan’s acquisition, holding, and disposition of employer securities received in settlement of litigation, including bankruptcy. Disposition of employer securities that are stock rights or warrants includes sale of these securities, as well as the exercise of the rights or warrants.

A variety of conditions must be met to enjoy the exemption. For example, (a) settlement must be authorized by an independent fiduciary (that is, one who has no relationship to, or interest in any of the parties involved in the claims, other than the plan, that might affect the exercise of that person’s best judgment as a fiduciary), (b) non-cash assets, which may include employer securities and promises of future employer contributions or written agreements to adopt future plan amendments or provide additional benefits, may be provided to the plan by the party in interest only if certain requirements are met, including a requirement that the authorizing fiduciary determine that an all cash settlement is either not feasible or is less beneficial to the participants and beneficiaries than accepting all or part of the settlement in non-cash assets or plan enhancements, and (c) where the litigation has not been certified as a class action, and no federal or state agency is a plaintiff in the litigation, an attorney retained to advise the plan on the claim, and having no relationship to any of the parties involved in the claims other than the plan, must determine that there is a genuine controversy involving the plan.

**Is a Release of Claims Against a Party in Interest a Prohibited Transaction?** Prior to the issuance of PTE 2003-39, the DOL took the position, in Advisory Opinion 95-26A, that when a fiduciary causes a plan to release claims against a party in interest, this may constitute a prohibited transaction. The advisory opinion concerned allegations that an investment fund had invested heavily in certain securities that were contrary to stated investment policies and took place without proper representations and disclosure to ERISA plans investing in the fund. The defendants denied the claims, but a proposed settlement was reached under which the defendants would make certain periodic payments to
conditional class members, while continuing to deny the contentions made by plaintiffs. In the advisory opinion, the DOL said where any of the defendants are still parties in interest, the settlement of the lawsuit would be an exchange of property (a chose in action) between the plan and the parties in interest prohibited under Section 406(a)(1)(A). It also suggested there could be a Section 406(b) self-dealing violation if a fiduciary were to use its influence as a fiduciary to cause the plan to enter into a settlement where the fiduciary is one of the defendants. The same would be the case if a fiduciary were to cause the plan (or, more precisely, use its influence as a fiduciary) to release claims against another person with respect to whom the fiduciary has an interest.

Helpfully, in the advisory opinion, the DOL indicated that ERISA Section 408(b)(2) may provide the necessary exemption to avoid the Section 406(a)(1)(A) violation where the party in interest is, for example, a service provider otherwise operating under the Section 408(b)(2) exemption in providing services to the plan. More precisely, the DOL said the following:

It is the view of the Department that with respect to any particular plan, the exemption provided in section 408(b)(2) may cover an exchange of property made solely to resolve claims arising out of the performance of an underlying service arrangement. In this regard, however, the Department notes that the exemption provided in section 408(b)(2) would, with respect to any particular plan, apply only if: (1) the underlying service arrangement giving rise to the party in interest relationship is exempt under section 408(b)(2) and any other applicable exemption and the underlying arrangement continues to meet the requirements of section 408(b)(2) and any other applicable exemption, after taking into account -- (a) the settlement itself including any extension of credit incident thereto, (b) the alleged conduct of the service provider which gave rise to the claim, and (c) the following additional factors where the nature of the alleged conduct makes their consideration appropriate - (i) the service provider's ability to provide adequate assurances that the alleged conduct which gave raise to the claims and similar conduct will not occur in the future, including, where relevant, the service provider's willingness to acknowledge intentional wrongdoing or negligence, and (ii) the plan fiduciaries' ability to guard against the opportunities for any future abuse that may be inherent in the party in interest relationships between the settling parties and the plan; (2) the party in interest relationship arises solely from service arrangements that are exempt under section 408(b)(2); and (3) the settlement, including any extension of credit incident thereto, is a reasonable arrangement from the point of view of the plan in that the plan fiduciaries have prudently

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2 It is the view of the Department that the exemption provided in section 408(b)(2) would encompass an extension of credit only to the extent that such extension is incidental to an arms-length, negotiated settlement agreement between the parties (which settlement would otherwise be exempt); that the appropriate plan fiduciaries have determined such extension is necessary to the settlement and in the best interest of the plan participants and beneficiaries; and that such extension is not otherwise part of an arrangement to secure credit unrelated to the settlement. See, e.g., Advisory Opinion 87-06A (issued November 9, 1987).
determined that the plan will receive payment in the settlement that is at least equal to the value of the plan's claims considering the risks of litigation and taking into account the creditworthiness of any party to whom credit is to be extended.


In its discussion in the Federal Register of comments on its proposed draft of PTE 2003-39, the DOL helpfully described other circumstances in which the sometimes burdensome requirements of PTE 2003-39 would not need to be met, even though a plan were settling litigation and in doing so were releasing claims against a party in interest. Here is the relevant portion of that recitation:

> [M]any situations in which a plan settles litigation may not give rise to a prohibited transaction or may be covered by an existing statutory or administrative exemption. For example, correction of a prohibited transaction that complies with section 4975(f)(5) of the Code; reimbursement of a plan without a release of the plan’s claim; settlement with a service provider of a dispute related to the provision of services or incidental goods to the plan that is otherwise exempt under ERISA 408(b)(2) (See, Opinion Letter, AO 95-26A); settlements authorized by the Department pursuant to PTE 94-71 (59 FR 51216, October 7, 1994, as corrected, 59 FR 60837, November 28, 1994); and judicially approved settlements where the Labor Department or the Internal Revenue Service is a party pursuant to PTE 79-15 (44 FR 26979, May 8, 1979).

In addition, the Department notes that this class exemption would be available for settlement agreements relating to an employer’s failure to timely remit participant contributions to a plan, including a collectively bargained multiemployer or multiple employer plan, to the extent the conditions contained in this final exemption are met. In this regard, the Department notes that the relief provided by this exemption is limited to the prohibited transactions that arise where a plan trustee and an employer enter into a settlement involving the employer’s failure to timely forward participant contributions to the plan as required under ERISA. Thus, nothing in this class exemption should be construed as exempting any of the prohibited transactions described in section 406(a) or 406(b) of ERISA that

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3 IRC Reg. sec. 141.4975–13 provides that for purposes of the excise taxes on prohibited transactions, the definition of the term “correction” under IRC Reg. sec. 53.4941(e)-1 (concerning excise taxes on self-dealing with foundations) is controlling.

4 The Department notes that the relief provided by this exemption would be available for settlements involving participant or employer contributions to a single employer plan or to a noncollectively bargained multiple employer plan.
arise solely in connection with an employer’s failure to timely forward
participant contributions to a plan.5

This exemption does not, however, apply to transactions described in PTE
76-1, A.I. (41 FR 12740, March 26, 1976, as corrected, 41 FR 16620, April
20, 1976) relating to delinquent employer contributions to a collectively
bargained multiemployer or multiple employer plan. Finally, PTE 76-1, A.I.
does not extend relief to those settlement arrangements that arise from the
failure of an employer to timely forward participant contributions to a
multiemployer or multiple employer plan.

Section 502(d)(1) of the Act provides that “an employee benefit plan may
sue or be sued under this title as an entity.” This exemption covers
settlement of any type of suit the plan has brought. However this exemption
is not available for settlement of claims brought by a party in interest against
a plan. This exemption does not cover a plan’s payment of money or other
things of value to a party in interest in exchange for the dropping of claims
against the plan. As with exchanges made for the release of claims in favor
of the plan, the Department’s determination in this regard is not dispositive
of whether such an exchange constitutes a prohibited transaction.

Finally, the Department notes that a settlement between a plan and a
participant or beneficiary made solely to resolve claims against a plan for
the recovery of benefits, by a participant or beneficiary, may not involve a
prohibited transaction. If the plan makes payment to a participant who is a
party in interest to settle a benefits dispute, such payment generally would
be viewed by the Department as the payment of a plan benefit that would
not trigger the need for an exemption. As the Supreme Court noted in
Lockheed Corp. v. Spink, 517 U.S. 882, 892-893 (1996), the payment of
benefits is not a prohibited transaction.

33830 (June 15, 2010), the DOL said the following:

Where a prohibited transaction giving rise to the actual or potential litigation
is “corrected” in compliance with section 4975(f)(5) of the Code, this
exemption will not be necessary because correcting a prohibited transaction
under section 4975 of the Code does not give rise to a prohibited transaction

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5 In this regard, the failure of an employer to timely remit contributions made to a plan by an employee of such
employer violates ERISA sections 403(a), 403(c)(1), 404(a)(1)(A), 406(a)(1)(D), and 406(b)(1).
under Title I of the Act. Additionally, there is no prohibited transaction if the plan receives consideration, but does not have to relinquish its cause of action, or other assets. Finally, if the dispute involves the provision of services or incidental goods by a service provider, the settlement may fall within the statutory exemption under section 408(b)(2) of the Act.

The exemption is not available where a party in interest is suing an employee benefit plan, unless the party in interest is suing on behalf of the plan pursuant to section 502(a)(2) or 502(a)(3) of ERISA, in their capacity as a participant, beneficiary, or fiduciary. Further, it is the view of the Department that, in general, no exemption is needed to settle benefits disputes, including subrogation cases.

V. **Whether to Use VFCP (If Not Under DOL Investigation).** The current incarnation of the Department of Labor’s Voluntary Fiduciary Correction Program (“VFCP”), and a related prohibited transaction exemption (PTE 2002-51), are found in the Federal Register of April 19, 2006, at 71 Fed. Reg. 20262, and 20135, respectively (April 19, 2006). VFCP may be used to correct certain fiduciary violations under ERISA. The program, though, is rigid, permitting the correction of only 19 types of transactions, and requiring that the specified method for correction be utilized. There is some paperwork involved, too, so the obvious question is whether it makes sense to go to the trouble of utilizing VFCP. There are three possible reasons for doing so. The first is the ability to use the VFCP online calculator to calculate correction amounts that must be paid to the plan. This can be helpful where, for example, Section 401(k) deferral amounts taken from employees’ paychecks are not deposited in the trust for the plan quickly enough, which the DOL (and probably IRS) would say constitutes a prohibited transaction, as an impermissible extension of credit from the plan to the employer. Rather than attempt to calculate the earnings participants would have enjoyed had the contributions been made timely, the DOL calculator may be used to calculate an amount to serve as a proxy for those missed earnings.

The DOL’s online calculator uses IRC Section 6621(a)(2) and (c)(1) underpayment rates in effect during the relevant time period and the corresponding factors from Revenue Procedure 95-17, which reflect daily compounding. In this way, the online calculator computes “lost earnings” and interest, if any. In addition, if the principal was used for a specific purpose – which will generally not be the case for run-of-the-mill incidences of delinquent contributions – such that a profit on the use of the principal amount is determinable, the online calculator computes interest on that profit. Under VFCP special rules for transactions involving large losses or large restorations, the online calculator

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6 Parties entering into such arrangement should review the IRS rules with respect to restorative payments. Rev. Rul. 2002-45, 2002-2 C.B. 116.


automatically re-computes the amount of “lost earnings” and “restoration of profits” using the applicable IRC Section 6621(c)(1) rates.

The Department of Labor’s position is that where VFCP is not utilized, the simplifying assumptions built into the online calculator are not available for use in correcting a fiduciary breach and potentially accompanying prohibited transaction. But in the case of delinquent contributions involving relatively small numbers of individuals and relatively brief periods of time, the difference in what the DOL would assert is required as a correction amount and the amount generated by the online calculator will normally be small.

The second reason for using VFCP – that is, in addition to the ability to use the online calculator in satisfying the DOL that a proper correction has been made – is that in the case of six prohibited transactions, including the late deposit of salary deferrals to a 401(k) plan, using VFCP entitles one to make use of an accompanying prohibited transaction class exemption. That exemption is PTE 2002-51, which was amended on April 19, 2006, to expand the number of transactions covered under the exemption from four to six. One of the disadvantages of claiming the benefit of PTE 2002-51 is that it generally requires that participants be notified of the VFCP application (through distribution of a notice to interested parties). There is an exception from this notice requirement for delinquent participant contributions and participant loan repayments to pension plans (pension plans within the meaning of ERISA, not the Tax Code) where the Section 4975 excise tax would be no more than $100 and the amount of the excise tax that would otherwise be imposed under IRC Section 4975 was paid to the plan and allocated to participants and beneficiaries in the same manner as provided under the plan with respect to plan earnings. In this event, the applicant under the VFCP program must provide a copy of a complete IRS Form 5330, or written documentation containing the information required by that form, and proof of payment with the submission of the VFCP application to the appropriate EBSA regional office. For the sole purpose of determining whether the IRC Section 4975 excise tax is no more than $100, the applicant may calculate the excise tax based on the lost earnings amount computed using the online calculator.

If one does not satisfy the requirements of PTE 2002-51, an IRS Form 5330 will need to be filed and the appropriate excise tax will need to be paid under IRC Section 4975. That will be the case whether or not VFCP is used.

The third reason one may wish to use VFCP in making a correction concerns how one completes Form 5500. Schedule H, Line 4a, asks whether there has been a failure to transmit participant contributions on a timely basis. If “yes,” a “Schedule of Delinquent Participant Contributions” must be attached. In that schedule, one must identify specifically whether VFCP was utilized and if so whether the conditions of PTE 2002-51 were satisfied. Since delinquent contributions must be included in Line 4a, one would prefer to be in a position to indicate that correction had been made, and one’s profile with the DOL (and IRS, if no Form 5330 has been filed and the requirements of PTE 2002-51 have not been met) will presumably be lower if VFCP has been utilized.
Interestingly, the instructions for Form 5500 indicate that Schedule G, where one reports on certain troubling financial matters, is to be completed if Lines 4b, 4c, or 4d on Schedule H are answered “yes.” But the text of Line 4d indicates that transactions reported on Line 4a, which, recall, is the line used to report delinquent participant contributions, are not to be listed in Line 4b. So, one would expect that whether or not late participant contributions have been corrected, they would not show on Schedule G. That’s good. Also good, the instructions indicate, presumably with respect to potential prohibited transactions other than delinquent participant contributions, that when the conditions of PTE 2002-51 have been satisfied, the corrected transactions should be treated as exempt under IRC Section 4975(c) for the purposes of answering Line 4d. This means they need not be reported on that line and need not show on Schedule G. So, in the case of prohibited transactions eligible for the exemption, other than delinquent participant contributions, taking advantage of PTE 2002-51 would avoid the red flag of disclosing the transaction on Form 5500.

**Covered Transactions Eligible for VFCP.** Here are the 19 categories of transactions eligible for VFCP:

- Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans
- Delinquent Participant Contributions to Insured Welfare Plans
- Delinquent Participant Contributions to Welfare Plan Trusts
- Fair Market Interest Rate Loans to Parties in Interest
- Below Market Interest Rate Loans to Parties in Interest
- Below Market Interest Rate Loans to Non-Parties in Interest
- Below Market Interest Rate Loans Due to Delay in Perfecting Security Interest
- Participant Loans Failing to Comply with Plan Provisions for Amount, Duration, or Level Amortization
- Defaulted Participant Loans
- Purchase of Assets by Plans from Parties in Interest
- Sale of Assets by Plans to Parties in Interest
- Sale and Leaseback of Property to Sponsoring Employers
- Purchase of Assets from Non-Parties in Interest at More Than Fair Market Value
- Sale of Assets to Non-Parties in Interest at Less Than Fair Market Value
- Holding of an Illiquid Asset Previously Purchased by Plan
- Benefit Payments Based on Improper Valuation of Plan Assets
- Payment of Duplicate, Excessive, or Unnecessary Compensation
- Improper Payment of Expenses by Plan
- Payment of Dual Compensation to Plan Fiduciaries

**Transactions Eligible for PTE 2002-51.** The six categories of transactions potentially eligible for PTE 2002-51 relief are the following:

- Failure to timely remit participant contributions to plans;
- Loans made at fair market interest rate by plans with parties in interest;
• Purchases or sales of assets between plans and parties in interest at fair market value;
• Sales of real property to plans by employers and leaseback of the property at fair market value and fair market rental value, respectively.
• Prohibited transaction violations involved in 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;
• 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.

The DOL has made available a VFCP model application form which may prove useful. In addition, the EBSA website includes a Fact Sheet entitled “Voluntary Fiduciary Correction Program,” as well as some FAQs about VFCP. Below are excerpts from those FAQs:

**Who is eligible to participate in the Program?**

EBSA will consider an application if neither the plan nor the applicant is “Under Investigation” (as defined in the Program) and if the application contains no evidence of potential criminal violations as determined by EBSA. We have made the Program available to more applicants by revising the definition of who is “Under Investigation.”

**Who is “Under Investigation” in the Program?**

A plan or potential applicant is “Under Investigation” if:
• EBSA is conducting an investigation of the plan;
• EBSA is conducting an investigation of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan;
• any governmental agency is conducting a criminal investigation of the plan, or of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan;
• the Tax Exempt and Government Entities Division of the IRS is conducting an Employee Plans examination of the plan; or
• the Pension Benefit Guaranty Corporation (PBGC), any state attorney general, or any state insurance commissioner is conducting an 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, unless the applicant notifies us, in writing, of the investigation or examination at the time of the application.

You must have received written or oral notice of the investigation or examination.

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**What if the U.S. Department of Labor receives an application from a plan sponsor that has not adequately corrected a violation?**
We may need to negotiate with the sponsor for full correction. In that case, the Section 502(l) penalty may apply to amounts restored as a result of the negotiation. Depending on the facts, EBSA may also need to conduct a civil or criminal investigation or take other action, such as seeking removal of persons from positions of authority with a plan.

**Are there any civil penalties involved in the Program?**

If the applicant meets the conditions of the Program, no Section 502(l) or 502(i) penalty would apply to correction amounts paid to the plan or to participants. We can still impose civil penalties under Section 502(c)(2) of ERISA if you fail to file a complete and accurate annual report Form 5500 on time. (See the Department’s DFVC Program to correct filing violations.) The Department must refer information about prohibited transactions to the IRS, as required by Section 3003(c) of ERISA. However, you may be eligible for relief from IRS excise taxes for certain VFCP transactions if you meet the conditions in the VFCP class exemption. This relief was expanded by a final amendment to the class exemption in April of 2006 to include the sale of certain illiquid assets to a party in interest and the payment of certain “settlor” fees.

**Can applicants who comply with the Program conditions be certain that the U.S. Department of Labor will take no further action against them?**

Yes. If you satisfy the terms of the Program, we will send you a no-action letter. The no-action letter states that we will not initiate a civil investigation under Title I of ERISA regarding your responsibility for any transaction described in the no-action letter, nor assess a Section 502(l) penalty. However, even if we issue a no-action letter, other government agencies or any other persons may still enforce their rights.

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**Do I have to use the Model Application Form?**

No, but we encourage you to use the form. It will help you submit a complete and accurate application.

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**How do I prove I corrected the violation?**

If you paid money to the plan, you must send us proof that the plan received it. For example, you could send us a copy of the canceled check or the plan’s bank statement showing the deposit. If you took other actions, such
as selling a plan asset, you should include proof of the action in your application.

**Do I have to use the Online Calculator?**

No. The Online Calculator was developed to make it easier for you to calculate the amount of money that needs to be paid back to the plan. If you decide to calculate this amount manually, you must submit your calculations. The Online Calculator instruction page also describes how to calculate this amount manually.

**Where do I apply?**

Applications should be mailed to the appropriate EBSA regional office.

**May I submit an application before I correct?**

No. The Program requires that you submit proof of corrective action with the application. If EBSA enters into negotiations with you because the violation hasn’t been properly corrected prior to submission, the correction could lead to a settlement within the meaning of Section 502(l) and the assessment of the penalty.

**What if I want to use a different method of correction than described in the Program?**

You must correct pursuant to the provisions in the Program in order to get a no action letter. If the applicant and EBSA negotiate the correction amount, the correction could lead to a settlement agreement within the meaning of Section 502(l) and the assessment of the penalty.

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**How do I determine when participant contributions to pension plans are late?**

The general rule is that contributions (other than union dues) withheld from an employee’s wages or paid to the employer by a participant must be sent to the plan on the earliest date these contributions can reasonably be separated from the employer’s general assets. This means that if you know how much should be sent to the plan three days after the pay date and it takes you another day to prepare the check, you must submit employee contributions four days after the pay date. In no event may these contributions be forwarded later than the 15th business day following the month of withholding. We expect that most employers can forward employee contributions well before this maximum time period ends.
How do I show the earliest date contributions can be segregated for purposes of preparing a VFCP application?

You must provide a description of the process you use to segregate employee contributions from the company’s general assets. The description could include:
• how you determine the amount to be sent to the plan
• how the company is organized to perform this function
• any requirements of a third party administrator
• any other information affecting the earliest date contributions can be segregated

You must also submit any documents used to determine this date. This documentation might be your past withholding and remittance history, your payroll policies and procedures, and documents supporting a third party’s requirements.

Participant contributions to the plan were delinquent, but the dollar amount needed to correct is very small. Do I have to participate in the VFCP?

No one is required to file an application under the VFCP to correct a violation. Participation is voluntary. Of course, you must take appropriate actions to correct the violation even if you don’t submit an application. However, if you don’t file an application with us, you can’t get the relief available under the Program. In addition, if we discover the violation during an investigation, and the correction was not complete, a civil penalty may be assessed on any additional amount required to fully correct the violation. Remember, too, that you aren’t eligible for the IRS excise tax relief unless you receive a no action letter. See the FAQs on the class exemption for more information.

How do I determine what is the “Restoration of Profits” amount for purposes of determining earnings on delinquent contributions?

“Restoration of Profits” is the amount earned by the fiduciary or party in interest on the use of the employee contributions not forwarded to the plan. If you can determine how this money was used and how much the money earned, the money earned is the amount of “Restoration of Profits.” We have found that usually the profit from the use of the withheld employee contributions usually can’t be determined.

I want to correct participant loan problems. The VFCP states I have to correct the loans under the Voluntary Correction Program of the IRS’ Employee Plans Compliance Resolution System (EPCRS) and receive their approval before I apply under the Program. How do I do this?
You should contact the IRS Voluntary Correction Coordinator at the following locations.

- Brooklyn, New York Tel: 718-834-5023
- Chicago, Illinois Tel: 312-292-4833
- Dallas, Texas Tel: 214-413-5525

The IRS, on its website, notes that there may be a concern about a Section 401(k) plan’s qualified status where salary deferrals are deposited late. Although the IRS website is opaque about why that might be the case, one presumes the assumption is that the contributions may be so late as to violate a deadline for contributions set forth in the terms of the plan. Remember, the IRS has, since the establishment of EPCRS and some years before, taken the position that a failure to follow the terms of a plan is disqualifying. In any event, the IRS says the following about the interaction of VFCP and EPCRS (note particularly the IRS website’s description of when it is permissible to use the DOL’s online calculator to generate reasonable estimates of earnings to be credited to participants):

**DOL and IRS correction programs are not interchangeable**

The goal of the DOL’s VFCP is to ensure that the employer isn't subject to DOL’s civil penalties. The goal of the IRS’s correction programs, including VCP, is to ensure that the plan doesn't lose tax benefits arising from its qualified status. It is critical that you know what your objectives are before deciding which program you want to use. Also, you may use both the DOL and IRS programs if you have a dual objective of avoiding the imposition of DOL’s civil penalties and the IRS’s revocation of your plan’s qualified status.

**The fix - correcting the mistake**

- **Salary deferrals never deposited** - If you failed to deposit salary deferrals to the plan, then you must make corrective contributions in the amount of the salary deferrals you should have timely deposited adjusted for earnings. The adjustment for earnings is measured from the earliest date you could have segregated the salary deferrals from your general assets to the date you actually make the corrective contributions.

- **Late deposit** - If you deposited the salary deferrals, but not timely, then to correct this mistake, you must contribute the earnings on the late deposited salary deferrals. Earnings are what the late deposited deferrals would have earned measured from the earliest date you could have segregated them from your general assets to the date you actually deposited them to the plan.

**Differences in the earning adjustment under DOL and IRS programs**

The general premise of both the DOL VFCP and IRS correction programs is to restore the plan to the position it would have been had you timely
deposited the salary deferrals. However, the earnings calculation in both programs could be different.

- **DOL’s VFCP** - earnings are determined using the greater of:
  - lost earnings (earnings that the plan would have earned if you had timely deposited the salary deferrals), or
  - restoration of profits (the profit you earned that is directly attributable to your investment of the salary deferrals that weren’t timely deposited).

You can use DOL’s online calculator when using VFCP to calculate earnings.

- **IRS correction program** - earnings are generally determined based on what the plan would have earned had you timely deposited the salary deferrals. The IRS correction programs do, however, allow you to use reasonable estimates (including the DOL’s online calculator) to calculate the earnings on the late deposited salary deferrals if either:
  - it’s possible to make a precise calculation but:
    - the probable difference between the approximate and the precise restoration of participants’ benefits is insignificant, and
    - the administrative cost of determining precise restoration would significantly exceed the probable difference, or
  - it’s not possible to make a precise calculation (for example, where it’s impossible to obtain plan data).

The IRS website also has this to say about PTE 2002-51:

- **DOL’s prohibited transaction class exemption in conjunction with VFCP**
  You may also be eligible to take advantage of the prohibited transaction class exemption in conjunction with VFCP if you:
  - deposited the salary deferrals to the plan’s trust within 180 days from the date the amounts would otherwise have been payable to the employees in cash;
  - satisfied all VFCP requirements;
  - received a no-action letter for your VFCP application; and
  - notified all interested persons in writing within 60 days of submitting your VFCP application. There is an exception to this notice requirement if:
    - your excise tax liability would have been $100 or less;
    - you contributed the amount of your excise tax liability to the plan; and
    - you allocated this amount to participants and beneficiaries according to the plan’s terms for allocating plan earnings.

If the transaction qualifies for the prohibited transactions class exemption, then you won't be liable for excise tax under IRC Section 4975.
In Section 2(d) of the Voluntary Fiduciary Correction Program (which, as noted earlier, is found at 71 Fed. Reg. 20262 (April 19, 2006)), the DOL also addresses the relationship between VFCP corrections and corrections the IRS might require under IRC Section 4975 where the prohibited transaction involves a qualified retirement plan, saying:

(d) Correction. The correction criteria listed in the VFC Program represents EBSA enforcement policy with respect to applications under the Program 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 violation. Applicants 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).\(^\text{11}\) Correction may not be achieved under the Program by engaging in a prohibited transaction that is not subject to a prohibited transaction administrative exemption.

VI. Miscellaneous Concerning Settling With Parties Other Than DOL. I have offered above some thoughts on considerations for fiduciaries, plan sponsors, service providers, and other parties in interest, when deciding whether, and if so how, to settle disputes (or potential disputes) with the Department of Labor concerning employee benefits plans. In this section, I will, while they are on my mind (and before I forget them), include a few unrelated thoughts about settling disputes with parties other than the Department of Labor.

Settling Litigation, Particularly Class Action Litigation. In their excellent, compact article entitled “How to Settle an ERISA Breach of Fiduciary Duty Case and Sleep at Night: A Checklist for Plan Trustees to Consider,” Myron Rumeld and Anthony Cacace describe steps settling parties may take to minimize risks following settlements of litigation. This fine article was available at [http://www.erisapracticecenter.com/2014/12/18/how-to-settle-an-erisa-breach-of-fiduciary-duty-case-and-sleep-at-night-a-checklist-for-plan-trustees-to-consider/](http://www.erisapracticecenter.com/2014/12/18/how-to-settle-an-erisa-breach-of-fiduciary-duty-case-and-sleep-at-night-a-checklist-for-plan-trustees-to-consider/) as recently as early March 2015. Rumeld and Cacace address separately (a) strategies for dealing with non-settling parties who might retain standing to sue the defendants, and (b) strategies for barring claims by co-defendants who are not settling, at least not at the moment. As to the former, the concern is that if a defendant, say, settles a lawsuit by the Department of Labor, this would not necessarily preclude participants from bringing suit grounded in the same facts at issue in the suit being settled, perhaps even bringing identical claims. Conversely, a settlement with participants who have filed suit would not necessarily bar a claim by the Department of Labor. And don’t forget that co-fiduciaries may have standing to sue settling fiduciaries as well.

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\(^{11}\) See section 4975(f) of the Code; section 141.4975-13 of the temporary Treasury Regulations and section 53.4941(e)-1(c) of the Treasury Regulations. The IRS has indicated that the federal tax treatment of a breach 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 and that, based on its review of the Program, except in those instances where the fiduciary breach or its correction involve a tax abuse, a correction under the VFC Program for a breach that constitutes correction for purposes of section 4975 and a correction under the VFC Program for a breach that also constitutes an operational plan qualification failure generally will constitute correction for purposes of the IRS’ Employee Plans Compliance Resolution System (EPCRS).
Rumeld and Cacace suggest that in considering how to protect themselves against future claims, fiduciaries consider the following possibilities:

- Define the settled claim as being brought on behalf of the plan (that is, define the plaintiffs as having brought the lawsuit in a representative capacity on behalf of the plan, seeking relief inuring to the benefit of the plan)
- Settle on a class-wide basis (even where a claim is brought by a single participant, condition the settlement on the court first certifying a class of participants, so the relief will bind all participants, and hope that the court’s approval of the class settlement will also reassure the DOL that it need not take further action)
- Request an order barring claims of other potential claimants
- Seek assurances from the DOL that it will not further pursue the matter itself

As to protecting the settling fiduciaries from claims by non-settling co-defendants, Rumeld and Cacace suggest either seeking a bar order, preventing the non-settling defendants from bringing third party claims against the settling fiduciaries, or conditioning the settlement on an agreement by the plaintiffs that they will draft or amend any claims against other defendants to provide that the damages sought from those defendants will be reduced by any damages those defendants could recover by way of a third party claim against the settling fiduciaries.

If settling fiduciaries are not confident they have adequately protected themselves from the risk of further claims, Rumeld and Cacace point out that any coverage release the fiduciaries give their fiduciary liability insurance carrier as a condition of the carrier contributing to the settlement should apply only to the claims being settled, and not to other claims arising from the same underlying event. Additionally, if the fiduciaries later replace their fiduciary liability coverage, they should make sure the new coverage extends to claims based on events prior to the effective date of the new coverage. Finally, Rumeld and Cacace note that if, as part of a settlement, defendants are to resign as fiduciaries, this resignation may handcuff them in their ability to pursue claims against other fiduciaries or service providers.

**Plan as Plaintiff in Class Action Litigation.** Sometimes a plan will find itself as a member of a class in a class action without having been a named plaintiff or otherwise having been intimately involved in the litigation prior to settlement. The late and beloved Nell Hennessy discussed the considerations for fiduciaries finding themselves in this circumstance, where, for example, failing to opt out will result in the plan’s claims being released as part of the settlement. She did so in her article entitled “ERISA Considerations in Litigation Settlements Involving Employer Securities and Mutual Funds.” This 2009 article could be found at [www.erisasettlements.com/press/Settlements_073009.pdf](http://www.erisasettlements.com/press/Settlements_073009.pdf) as recently as March 2015.

Where a class action is certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, as was the case for many of the securities fraud class actions that were the
In non-opt out class actions, such as many suits brought by participants for breach of fiduciary duty seeking to recover for the plan, it is not clear a plan fiduciary will have taken any action causing the release of the plan’s (or fiduciary’s) claims. So, there may be no prohibited transaction compelling a fiduciary to take advantage of the exemption in PTE 2003-29. The Department of Labor, in the preamble to PTE 2003-39, though, refused to address when, if ever, a settlement associated with a non-opt out class action would constitute a prohibited transaction necessitating the use of PTE 2003-39. The DOL did observe that even if a fiduciary does not cause a transaction with the plan (the release of the plan’s claims) a prohibited transaction could still occur under Tax Code Section 4975 if the settlement results in a transaction between a qualified retirement plan and a disqualified person. This may cause the disqualified person to want assurance that the requirements of PTE 2003-39 have been followed. The disqualified person may want this assurance because the Tax Code Section 4975 excise tax is to be paid by the disqualified person, not the fiduciary. Further, because a fiduciary could seek leave to intervene in even a non-opt out class action and object to the terms of the settlement, a fiduciary’s decision not to do so might be considered a release of the plan’s claims, in which case the fiduciary may wish to take advantage of PTE 2003-39.

In addition to the conundrum about what a fiduciary should do in the case of a non-opt out case, even in an opt out class action, the fiduciary’s duties may be complicated where the opportunity to opt out occurs prior to negotiation of a settlement, rather than after the terms of the settlement are known.

Here is some of what the preamble to PTE 2003-39 had to say about settling class action litigation:

The commenters explained that ERISA class actions are often nonopt out cases. According to the commenters, this means that where class action litigation is brought by the participants, the plan fiduciary may, without taking any action, be bound by the class action settlement. In light of this, the commenters asked how such a fiduciary could cause a prohibited transaction where it took no action and yet was bound by the settlement. The Department does not regard this exemption proceeding to be the appropriate setting for resolving questions concerning what types of settlement are more or less likely to be prohibited transactions.

The Department notes, however, that the fiduciary is unlikely to remain uninvolved in the settlement of an ERISA lawsuit initiated by participants for two reasons. First, the fiduciary will, in all likelihood, be named as a
party to the lawsuit and the court will almost certainly require the plan fiduciary’s input on the settlement. Alternatively, the party in interest likely will seek the involvement of the fiduciary because the party in interest (disqualified person) may need to take advantage of the relief provided by the class exemption in order to avoid the possible imposition of excise taxes under section 4975 of the Code. Under the Code, such excise taxes are paid by the disqualified person who participates in the prohibited transaction, not the fiduciary who caused the plan to engage in the transaction.

In order to meet the conditions of the class exemption, the fiduciary faced with a nonopt out class action must take such actions as are appropriate under the particular circumstances. For example, before such a settlement is imposed on a nonopt out class, generally there is an opportunity to object to its terms. If the fiduciary does not believe that the proposed terms and conditions of the settlement are as favorable to the plan as comparable arm’s-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances, it should object to the settlement.

In securities fraud class action cases, there is often an option to opt out of the class. Where the plan or the plan trustee, as the holder of record of the securities, is a class member, whatever action or inaction that fiduciary determines to undertake has consequences for the plan. If the fiduciary takes no action, and the case is settled for far less than the full value of the plan’s losses, the burden will be on the fiduciary to justify its inaction. The fiduciary responsible for authorizing settlement of class action claims must decide, not only whether or not to opt out of the class action, but also whether to protest the proposed settlement during the fairness hearing.

And in the preamble to a 2010 amendment to the PTE, found at 75 Fed. Reg. 33830 (June 15, 2010), the DOL said the following:

In a class action, the authorizing fiduciary should consider whether the plan is being treated less equitably than are other class members, either by the terms of the settlement or through the failure of the settlement to adequately recognize the plan’s particular interests. For example, a settlement could be viewed as less advantageous to the plan than to other class members if it requires the plan to surrender ERISA-related claims without payment of additional consideration, or if it imposes restrictions on the plan that are not placed on other class members (e.g., by not considering some or all of the plan’s securities in allocating settlement proceeds).

VII. EBSA Website Excerpts. The following are excerpts from the EBSA website, as visited in February 2015. Both for the sake of readability and to accommodate my slothfulness, I may fail to indicate where ellipses occur and will omit most footnotes. This means you won’t know where there are gaps in what I have included below, so please be sure to go to
the website itself for any careful learning on matters that interest you, rather than relying solely on the excerpts below:
A. From Enforcement Manual, Chapter 10, on “Investigative Authority”:

1. **Statutory Authority.** The investigative authority given to the Secretary of Labor (Secretary) under ERISA is found in section 504 and section 506 (as amended by the Comprehensive Crime Control Act of 1984) and relates to all investigations undertaken pursuant to Title I of the Act.

2. **Interpretation of Section 504.** Section 504(a) gives investigative authority to the Secretary in order to determine whether any person has violated Title I of ERISA or any regulations or orders issued thereunder. This authority extends to investigations of actual or potential violations of Title I.

3. **Interpretation of Section 506.** Section 506(b) was amended by the Comprehensive Crime Control Act of 1984 to give the Secretary explicit authority to investigate criminal violations of Title 18 of the United States Code, insofar as they relate to employee benefit plans. In particular, the Secretary was given specific jurisdiction to investigate potential criminal violations of Sections 664, 1027, 1954, 669, 1035, 1347, and 1518 of Title 18. However, the Secretary continues to observe certain limitations on the exercise of this authority under an agreement with the Department of Justice. See paragraph 6 below.

4. **Making Information Available to Affected Person.** Section 504(a) provides that the Secretary may make information available to any person actually affected by any matter which is the subject of an investigation. Generally, such persons will include plan fiduciaries, participants, beneficiaries, or their representatives. In appropriate cases, others may also be included. This section does not permit disclosure of information specifically prohibited by another statute, such as grand jury information subject to Rule 6(e) of the Federal Rules of Criminal Procedure or tax information subject to Section 6103 of the Internal Revenue Code. (See Chapter 20, Release of Information, for discussion of restrictions on disclosure).

   * * * *

6. **Investigation of Criminal Matters Related to ERISA**

   a. On February 9, 1975, the Department of Labor (DOL) and the Department of Justice (DOJ) executed a Memorandum of Understanding (MOU) which provided for a specific case-by-case delegation from the DOJ regarding investigations of criminal matters relating to employee benefit plans. With the passage of the Comprehensive Crime Control Act of 1984, the DOL has express statutory authority to investigate criminal matters relating to employee benefit plans. Accordingly, the DOL is no longer required to obtain delegation on a case-by-case basis; however, Employee Benefits Security Administration (EBSA) Investigators/Auditors will contact the appropriate United States Attorney’s Office (USAO) as early as possible in the investigation to determine interest by the USAO.

   * * * *
9. Investigations Under Title IV of ERISA. The statute does not give the Secretary authority to investigate under Title IV of the Act. Under Section 4003(d), the Pension Benefit Guaranty Corporation (PBGC) may make agreements with the Secretary to help carry out the provisions of Title IV.

10. Litigative Responsibility for Civil Cases. A Memorandum of Understanding entered into on February 11, 1975, between the Department of Justice and the Department of Labor, established litigative responsibility under ERISA. Pursuant to the agreement, primary litigative responsibility for the preparation and presentation of most civil cases arising in the district courts and courts of appeals under the Employee Retirement Income Security Act of 1974 is exercised by attorneys in the Office of the Solicitor of Labor. There are certain exceptions which are set out in the Memorandum of Understanding.

11. Prosecution of Criminal Matters. The Memorandum of Understanding between the Secretary and the Department of Justice provides that all cases involving criminal provisions of ERISA will be prosecuted by the Department of Justice.

12. Agreements with Other Government Agencies. EBSA, in addition to having agreements with the Department of Justice, has agreements with the following government agencies:

- Internal Revenue Service;
- Departments of Treasury and Health and Human Services;

* * * * *
B.  *From Enforcement Manual, Chapter 12, on “Relationship With The IRS”:*

10. **Jurisdiction.** Because most pension plans are qualified plans under the Code, the IRS has primary authority for the administration of the minimum standards provisions of ERISA. Thus, if the IRS determines that a plan meets the requirements for tax qualification, DOL is required, under section 3001(d) of ERISA, to accept the IRS determination as prima facie evidence of the plan's initial compliance with, among other things, parts 2 and 3 of Title I. Section 3002(a) of ERISA also provides that, in the case of a qualified plan, alleged violations of the participation and vesting standards should generally be referred to the Secretary of the Treasury, and section 101 of Reorganization Plan No. 4 of 1978 transferred most of DOL's responsibilities with respect to the interpretation of parts 2 and 3 to the Department of the Treasury. Since the IRS is the agency within the Treasury Department that is responsible for the administration of the Code, including the provisions dealing with qualified plans, most complaints concerning the minimum standards provisions should be referred to IRS. In some cases, however, it may be necessary for DOL to conduct an investigation or to take enforcement action. For example, such action would be appropriate when a pension plan which is not qualified under the Code may have violated a provision of parts 2 and 3 for which DOL has interpretive responsibility under Reorganization Plan No. 4 of 1978. Matters which appear to be in these categories should be referred through the RO [Regional Office] to DFO [Division of Field Operations]. DOL has a continuing concern regarding special rules for multiple employer plans. These matters which arise under part 2 of Title I are discussed in paragraph 21 of this chapter.

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24. **General Coordination of Examination Programs**

a. The procedures established in the coordination agreement [with the IRS] shall apply to all civil examinations conducted by EBSA and IRS. However, nothing contained in the agreement shall preclude the agencies from agreeing to use special procedures, including joint investigations, in appropriate cases.

b. EBSA Regional Offices will notify the IRS of the names of plans selected for civil investigation at the beginning of each week (for case opening activity for the prior week).

* * * * *

25. **Examination Referral Program.** IRS and DOL have developed checksheets for determining whether issues presented in an examination/investigation by one agency should be referred to the other agency. The checksheets can be three-part snapout forms or computer generated forms (respectively known as Checksheets A and B, or Forms 6212A and B). These checksheets can be viewed on IRS’ website. See www.irs.gov/pub/irs-pdf/f6212a.pdf and www.irs.gov/pub/irs-pdf/f6212b.pdf. In every examination/investigation the referring agency will complete the appropriate checksheet on the basis of query or information readily available, and the following procedure shall apply.
a. EBSA Investigators/Auditors will complete Checksheet A during their investigations. IRS examiners will complete Checksheet B during their examinations. Any checksheets with answers circled in the right column will be referred to the other agency. IRS will also send a copy of Form 5500 with any Checksheet B referrals.

* * * * *

c. The initiating agency will complete the checksheet during an examination/investigation.

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26. IRS-Initiated Examinations.

a. IRS examiners will complete Checksheet B as soon as possible in all IRS field examinations of pension benefit plans.
b. When an entry on a Checksheet B requires the referral of the checksheet to EBSA, IRS will refer the checksheet in accordance with paragraph 25 of this chapter.

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27. EBSA-Initiated Investigations.

a. EBSA Investigators/Auditors will complete Checksheet A for pension benefit investigations during all civil investigations.

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Note from Author: Examination of Referral Checksheets A and B (IRS Forms 6212-A and 6212-B) are attached to this outline as Appendices B and C, respectively.

28. IRS Appeals Office Procedures. The following procedures apply to all cases received by IRS Appeals Offices involving examinations of employee benefit plans:

b. The Appeals Area Director will not take final action to settle the case, concede any government issue, enter into a closing agreement with any taxpayer, issue any notice of deficiency with respect to taxes under sections 4971(a) and/or (b) or 4975 that are not in jeopardy, or proceed with any action to revoke the favorable determination or qualification letter of any plan prior to the earlier of the date when the Appeals Area Director receives a response from EBSA or 60 days after the date of the Appeals Area Director’s letter to EBSA.

* * * * *

29. Notification of Litigation

a. Litigation Involving IRS and Relating to the Administration of Title I of ERISA:
1. The Division Counsel/Associate Chief Counsel (TE/GE) (or designee), will forward to the DOL Solicitor (Attention: Associate Solicitor, Plan Benefits Security Division), and Director of Enforcement, EBSA, at the earliest possible date, a copy of any complaint or other opening pleading in litigation to which the IRS, the Treasury, the United States or any official thereof is a party, either in the Tax Court, Claims Court or in district court, and that presents issues relating to the administration of Title I of ERISA. Further pleadings in such matters will be furnished upon request.

2. The Division Counsel/Associate Chief Counsel (TE/GE) (or designee), will notify the DOL Solicitor (Attention: Associate Solicitor, Plan Benefits Security Division), at the earliest possible date, whenever IRS determines that it will seek to intervene in any action in which the Secretary of the Treasury is entitled to do so under the provisions of ERISA section 502(h). The initial pleadings submitted on behalf of the Secretary will be forwarded to the Associate Solicitor. Further pleadings in such matters will be furnished upon request.

b. Litigation Involving DOL and Relating to Employee Benefit Plans.

1. The Solicitor of Labor (or designee) will notify the Division Chief/Associate Chief Counsel (TE/GE) and the Director, EP Examinations T:EP:E, when it is determined that litigation by DOL relating to employee benefit plans is warranted. Copies of the proposed complaint (or other opening pleading and supporting documents) will be furnished to the Chief Counsel for review and to the Department of Justice for its assignment of primary litigative responsibility under the Memorandum of Understanding of February 11, 1975.

2. The Solicitor of Labor (or designee) will forward to the Division Counsel/Associate Chief Counsel (TE/GE) a copy of any pleading filed naming the Secretary of Labor as a defendant and presenting issues relating to employee benefit plans. Further pleadings in such matters will be furnished upon request.

3. The Solicitor of Labor (or designee) will notify the Division Counsel/Associate Chief Counsel (TE/GE) at the earliest possible date whenever DOL determines that it will seek to intervene in any action in which the Secretary of Labor is entitled to do so under the provisions of ERISA section 502(h). The initial pleadings submitted on behalf of the Secretary will be forwarded to the Director. Further pleadings in such matters will be furnished upon request.

* * * *

31. Requesting Information from IRS

a. In general, IRS is prohibited from disclosing any tax information to anyone outside IRS. IRC section 6103 lists the exceptions to this general rule. IRC section 6103(l)(2) allows the IRS to furnish information to DOL and PBGC for the enforcement of Titles I and IV of ERISA. This includes requests for tax return information.

* * * *

c. Do not request any information under IRC section 6103(l)(2) which is authorized to be disclosed under IRC section 6104. IRS section 6104 provides that any application for
tax-qualified status of a pension, profit sharing, stock bonus, annuity, bond purchase, individual retirement account, or individual retirement annuity plan, any application filed with respect to the tax-exempt status of an organization forming part of such plan or account, any papers submitted in support of any such application, and any letter or other document issued by the IRS in connection with such tax qualification or tax exemption is to be open for public inspection; however, if a plan does not have more than 25 participants, this right of public inspection is open only to a plan participant. The places and times for the right of public inspection are specified in the regulations issued under IRC section 6104. Materials or documents from which an individual's compensation may be ascertained are not open to public inspection. This right of public inspection applies to applications filed and documents issued after September 2, 1974.

* * * * *

32. **Examinations Pursuant to HIPAA.** The Health Insurance Portability and Accountability Act of 1996 (HIPAA), was enacted on August 21, 1996. Titles I and IV of HIPAA amended the Internal Revenue Code, ERISA, and the Public Health Service Act to add provisions to improve access, portability, and continuity of health insurance coverage in the group and individual market.

Section 104 of HIPAA directed the Secretary of Treasury, the Secretary of Labor, and the Secretary of Health and Human Services to enter into an interagency memorandum of understanding to ensure that regulations, rulings, and interpretations relating to the changes made by HIPAA over which two or more Secretaries have responsibility (“shared provisions”) are administered so as to have the same effect at all times. Further, the agencies were required to coordinate policies relating to enforcing the shared provisions in order to avoid duplication of enforcement efforts and to assign priorities in enforcement. An Interim Memorandum of Understanding to that end was entered into by the three agencies in December 1999.

The terms of the Interim MOU also apply, to the extent appropriate, with regard to interpretations and enforcement of the Newborns’ and Mothers’ Health Protection Act of 1996, the Mental Health Parity Act of 1996, and the Woman’s Health and Cancer Rights Act of 1998.
From EBSA website page on “ERISA Enforcement”:

* * * * *

Enforcement Accomplishments

If an investigation reveals a violation of the civil provisions of ERISA, EBSA takes action to obtain correction of the violation. It is EBSA’s policy to promote voluntary compliance with ERISA whenever possible. Making corrections to plans includes paying amounts to restore losses, disgorging profits, ensuring claims are properly processed and paid, and paying penalty amounts (when applicable). Labor Department attorneys work with field offices to provide every opportunity for fiduciaries to comply with ERISA. If the persons involved take the proper corrective action, the Department will not bring a civil lawsuit with regard to the issues involved. When voluntary compliance is not achieved, EBSA may refer a case to Labor Department attorneys for litigation. Plan assets recovered by EBSA go directly back to the plans and participants involved. See the agency’s results fact sheet for the enforcement accomplishments for the last fiscal year.

National Enforcement Priorities

Major Case Enforcement Priority - EBSA seeks to focus its enforcement resources on areas that have the greatest impact on the protection of plan assets and participants’ benefits. Beginning in FY 2013, EBSA is strategically focusing more investigative resources on professional fiduciaries and service providers with responsibility for large amounts of plan assets and the administration of large amounts of plan benefits. This will be accomplished by a national enforcement priority that directs investigative resources to the conduct of major cases.

Employee Contributions Initiative - Consistent with its long history of protecting employee contributions to 401(k), health care, and other contributory plans, EBSA designated the investigation of delinquent employee contributions, a previous national project, as a national enforcement priority. For more information, see the Employee Contributions Initiative webpage.

National Enforcement Projects

In its continuation of focusing enforcement resources on having the greatest impact on the protection of plan assets and participants’ benefits, EBSA has identified certain national enforcement projects in which field offices are to place particular investigative emphasis.

Contributory Plans Criminal Project (CPCP) - The CPCP is EBSA’s first solely national criminal project and is designed to target persons who commit fraud and abuse against participants and beneficiaries of contributory employee benefit plans. Millions of American workers share in the costs of employee benefits by contributing to employer sponsored retirement and health benefit plans. This project focuses on protecting employees who participate in all types of contributory plans – both pension and health. There are a number of ways in which contributory plans can be vulnerable to criminal
abuse. Employers, or others with authority over plan assets, may convert employee payroll contributions for their own personal use or may use employee contributions to pay business expenses. This may result in unpaid health benefits or insurance premiums, leaving workers without medical coverage, or result in unpaid contributions to workers’ 401(k) plans, leaving the employees with reduced or nonexistent retirement savings. Unscrupulous service providers may also target these plans for their own personal benefit and profit. EBSA has uncovered some instances where third parties have gained access to these funds and have used these funds for their own financial gain. These schemes can involve internal employees or third parties who may steal from these accounts by using identity theft and tampering with personal data records.

**Fiduciary Service Provider Compensation Project** - Under this project, which was implemented in FY 2013, EBSA will continue to investigate the receipt of improper or undisclosed compensation by employee benefit plan consultants and other investment advisers. This project complements the Department’s regulatory and reporting initiatives intended to ensure that plan fiduciaries and participants receive comprehensive disclosure about service provider compensation and conflicts of interest. EBSA will also conduct criminal investigations of potential fraud, kickback, and embezzlement involving advisers to plans and participants.

**Health Benefits Security Project** - Established in FY 2012, the Health Benefits Security Project (HBSP) is EBSA’s comprehensive national health enforcement project, combining EBSA’s established health plan enforcement initiatives with the new protections afforded by the Patient Protection and Affordable Care Act of 2010 (ACA). The HBSP involves a broad range of health care investigations, including examinations for compliance with ERISA Part 7 and ACA, civil and criminal investigations of multiple employer welfare arrangements (MEWAs), investigations of insurance companies and claim administrators to ensure that promised benefits are actually provided, and criminal investigations of fraudulent medical providers.

The HBSP continues EBSA’s ongoing efforts to detect and correct violations found in Part 7 of ERISA. Although the ACA introduced broad reforms, most of Part 7’s protections remain in effect for ERISA plans, such as those contained in the Women’s Health and Cancer Rights Act (ERISA Section 713), the Mothers’ and Newborns Health Protection Act (ERISA Section 711), the Mental Health Parity Act and Mental Health Parity and Addiction Equity Act (ERISA Section 712), the Genetic Information and Nondiscrimination Act, and Michelle’s Law (ERISA Section 714).

The HBSP investigations examine compliance with applicable provisions of the ACA, which includes market reforms, patient protections, extension of dependent coverage, internal claims and appeals and external reviews and grandfathered health plans.

The plan document may contain ERISA- and ACA-compliant language and procedures, but operationally, the promised health benefits are not provided at all or not within the requirements of the law or the plan document. Therefore, the HBSP also focuses on plans’
and claims administrators’ failure to provide promised health benefits through a lack of disclosure or through the misapplication in substance or in procedure of the plan’s terms.

In addition, the HBSP continues EBSA’s long-standing efforts to seek out and shut down abusive MEWAs and to proactively identify known fraudulent MEWA operators to ensure they do not terminate one MEWA just to open another in a different state. To assist in these efforts, ACA authorizes the Secretary of Labor to immediately issue a cease and desist order when fraud is apparent. The Secretary may also seize assets from a MEWA when probable cause exists to believe that the plan is in a financially hazardous condition. Final regulations, which became effective on April 1, 2013, established policies and procedures for implementation of the cease and desist and summary seizure rules.

The HBSP also includes criminal investigations of MEWAs. Numerous schemes investigated by EBSA in the last few years have involved mail fraud, wire fraud, bankruptcy fraud, and other ERISA crimes. These criminal MEWA cases, which are prosecuted for the Department by U.S. Attorneys’ offices, have resulted in jail sentences and court ordered restitution against fraudulent MEWA operators.

Finally, health care fraud by medical providers drains limited assets available to pay benefits and raises the cost of coverage for employees. Health plans often have limited resources to detect and protect itself against such fraud. The HBSP is expanded to include criminal cases aimed at fraud on self-funded health plans by medical providers.

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Employee Stock Ownership Plans - The Employee Stock Ownership Plan (ESOP) project is designed to identify and correct violations of ERISA in connection with ESOPs. ESOPs are designed to invest primarily in employer securities. Due to their unique nature, ESOPs can have distinct violations, as well as violations that might occur in any employee benefit plan. One of the most common violations found is the incorrect valuation of employer securities. This can occur when purchasing, selling, distributing, or otherwise valuing stock. Other issues involve the failure to provide participants with the specific benefits required or allowed under ESOPs, such as voting rights, ability to diversify their account balances at certain times, and the right to sell their shares of stock when received. EBSA will also review the refinancing of ESOP loans following EBSA's issuance of FAB 2002-1.
D. From Fact Sheet entitled “EBSA Restores Over $599.7 Million to Employee Benefit Plans, Participants and Beneficiaries” (note that when the Fact Sheet below refers to FY 2014, this is the period from October 1, 2013, through September 30, 2014):

EBSA Restores Over $599.7 Million to Employee Benefit Plans, Participants and Beneficiaries

Through its enforcement of the Employee Retirement Income Security Act (ERISA), the Employee Benefits Security Administration (EBSA) is responsible for ensuring the integrity of the private employee benefit plan system in the United States. EBSA's oversight authority extends to nearly 684,000 retirement plans, approximately 2.4 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance. These plans cover about 141 million workers and their dependents and include assets of over $7.6 trillion (as of October 29, 2014). In FY 2014, EBSA recovered $599.7 million for direct payment to plans, participants and beneficiaries. (Discussed below).

<table>
<thead>
<tr>
<th>Total Monetary Results</th>
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</thead>
<tbody>
<tr>
<td><strong>Total Recoveries</strong></td>
</tr>
<tr>
<td>Plan Assets Restored/Participant Benefits Recovered</td>
</tr>
<tr>
<td>Voluntary Fiduciary Correction Program</td>
</tr>
<tr>
<td>Abandoned Plan Program</td>
</tr>
<tr>
<td>Monetary Benefit Recoveries from Informal Complaint Resolution</td>
</tr>
</tbody>
</table>

Civil Investigation Statistics Demonstrate Success in Targeting

In FY 2014, EBSA closed 3,928 civil investigations with 2,541 of those cases (64.7%) resulting in monetary results for plans or other corrective action, exhibiting its ability to effectively target ERISA violators in the employee benefit plan universe.

EBSA often pursues voluntary compliance as a means to correct violations and restore losses to employee benefit plans. However, in cases where voluntary compliance efforts have failed, or that involve issues for which voluntary compliance is not appropriate, EBSA forwards a recommendation to the Solicitor of Labor to initiate litigation. In FY 2014, 161 cases were referred for litigation. Together, EBSA and the Solicitor of Labor determine which cases are appropriate for litigation, considering the ability to obtain meaningful relief through litigation, cost of litigation, viability of other enforcement options, and agency enforcement priorities. EBSA cases referred to the Solicitor's office for litigation are often resolved with monetary payments, short of litigation. Nationwide in FY 2014, the Department filed suit in 107 civil cases.
EBSA Investigations Led to the Indictment of 106 Persons for Crimes Related To Employee Benefit Plans in FY 2014

EBSA has responsibility to investigate potential violations of the criminal provisions of ERISA and those provisions of Title 18 of the United States Code that relate to employee benefit plans. EBSA conducts most of its criminal investigations with other federal law enforcement agencies under the direction of the United States Attorney for that jurisdiction. Other investigations are conducted in consultation with the appropriate state or local law enforcement authority.

In FY 2014, EBSA closed 365 criminal investigations. EBSA's criminal investigations, as well as its participation in criminal investigations with other law enforcement agencies, led to the indictment of 106 individuals – including plan officials, corporate officers, and service providers – for offenses related to employee benefit plans.

Compliance Assistance Programs Yielded Tremendous Results

EBSA's Voluntary Fiduciary Correction Program (VFCP) and Delinquent Filer Voluntary Compliance Program (DFVCP) encourage the correction of violations of ERISA by providing significant incentives for fiduciaries and others to self-correct.

The VFCP allows plan officials who have identified certain violations of ERISA to take corrective action to remedy the breaches and voluntarily report the violations to EBSA, without becoming the subject of an enforcement action. In FY 2014, EBSA received 1,643 applications for the VFCP.
The DFVCP encourages plan administrators to bring their plans into compliance with ERISA's filing requirements. More than 24,000 annual reports were received through this program in FY 2014.

<table>
<thead>
<tr>
<th>Correction Programs</th>
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</tr>
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<tbody>
<tr>
<td>VFCP Applications Received</td>
<td>DFVCP Filings Received</td>
</tr>
<tr>
<td>1,643</td>
<td>25,060</td>
</tr>
</tbody>
</table>

$356.2 Million Restored to Workers through Informal Complaint Resolution

When workers experience a problem with an employee benefit plan, EBSA has proven effective in resolving their requests for assistance. In FY 2014, EBSA's Benefits Advisors closed more than 213,000 inquiries and recovered $356.2 million in benefits on behalf of workers and their families through informal resolution of individual complaints. Many of the inquiries were received via EBSA's toll-free number 1-866-444-EBSA (3272) and Web site askEBSA.dol.gov.

These inquiries are also a major source of enforcement leads. When EBSA becomes aware of repeated complaints with respect to a particular plan, employer, or service provider, or when there is information indicating a suspected fiduciary breach, the matter is referred for investigation. In FY 2014, 687 new investigations were opened as a result of referrals from Benefits Advisors.

<table>
<thead>
<tr>
<th>Inquiry Statistics</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Total Inquiries</td>
<td>Monetary Benefit Recoveries from Informal Complaint Resolution</td>
</tr>
<tr>
<td>213,664</td>
<td>$356.2 M</td>
</tr>
<tr>
<td></td>
<td>Investigations Opened from Inquiry Referrals</td>
</tr>
<tr>
<td></td>
<td>687</td>
</tr>
</tbody>
</table>
E. From EBSA’s page on “Freedom of Information Act”:

The Freedom of Information Act (FOIA) provides that any person has the right to request access to federal agency records or information. Like all federal agencies, the Department of Labor is required to disclose records requested in writing by any person. However, agencies may withhold information pursuant to nine exemptions and three exclusions contained in the statute.

* * * * *

All agency records must be made available to the public under the Freedom of Information Act (FOIA), except for records that are:

* * * * *

3. Specifically exempted by other statutes.

4. Concerning trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

5. Privileged interagency or intra-agency memoranda or letters, except under certain circumstances.

6. Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

7. Investigatory records compiled for law enforcement purposes.

8. Contained in or related to certain examination, operating, or condition reports concerning financial institutions.

* * * * *
F. From Enforcement Manual, Chapter 20, on “Release of Information”:

* * * * *

2. Release of Information Pursuant to ERISA §504

a. Section 504 of ERISA provides that the Secretary may make available to any person actually affected by any matter which is the subject of an investigation, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation, except that any information obtained by the Secretary pursuant to section 6103 of the Internal Revenue Code shall be made available only in accordance with regulations prescribed by the Secretary of the Treasury. (See paragraph 7 for treatment of IRS information.)

b. Information concerning any matter which is the subject of an open investigation may not be disclosed without approval from OE/DFO [Office of Enforcement/Division of Field Operations]. Information concerning any matter which is the subject of a closed investigation may be disclosed pursuant to ERISA §504, subject to the restrictions imposed by various statutes and rules, such as the Freedom of Information Act (see paragraph 4), the Right to Financial Privacy Act (see paragraph 5), the Privacy Act (see paragraph 6), the Internal Revenue Code (see paragraph 7), Rule 6(e) of the Federal Rules of Criminal Procedure (see paragraph 8), and 18 U.S.C. §1905 prohibiting disclosure of confidential information.

* * * * *

4. Release of Information Pursuant to the Freedom of Information Act

a. The Freedom of Information Act (FOIA), 5 U.S.C. §552, requires federal agencies to make records promptly available to any person whose request reasonably describes the records sought and who complies with procedures for making such requests. Departmental regulations concerning FOIA are found at 29 C.F.R. Part 70.

Normally an agency must respond to a request within 20 business days. If a response cannot be made within the 20 business day limit, an extension of the deadline should be telephonically obtained from the requester and subsequently confirmed in writing to the requester.

b. Federal agencies are not required to disclose material which falls within the nine exemptions set forth in FOIA. These exemptions are for material concerning:

1. national security or foreign policy;
2. internal agency personnel rules and practices;
3. specific exemptions provided for by statute;
4. trade secrets and privileged or confidential commercial and financial information;
5. inter-agency and intra-agency memoranda and letters not available by law to a party in litigation with the agency;
6. personnel and medical files;
7. law enforcement records or information;
8. financial regulatory matters; and
9. technical information about wells.

The exemptions most likely to be relevant to Investigators/Auditors are those dealing with personnel rules, commercial and financial information, inter-agency and intra-agency communications, law enforcement records, and financial regulatory information. See paragraph 5 for a discussion of the exemption dealing with information from financial regulatory agencies.

c. By Executive Order 12600 and Departmental regulations 29 CFR 70.26, Exemption 4, which addresses the protection of documents containing trade secrets or confidential commercial information, establishes procedures which must be met prior to a decision to release records. When a claim of confidential commercial information is received from a party providing information to the Department, the case file should be identified as containing such a request. In addition, a copy of the request should be forwarded to OE.

* * * *

6. Release of Information Subject to the Privacy Act

a. The Privacy Act, 5 U.S.C. §552a, provides that, with certain exceptions, an agency must not disclose any record contained in a system of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual unless it has permission of the individual to whom the record pertains.

* * * *

7. Release of Information Obtained from the IRS

a. IRC section 6103 generally prohibits the IRS from disclosing federal tax returns and return information (Federal Tax Information). However, exceptions to the general prohibition allow the IRS to furnish tax returns and return information to DOL for the enforcement of Title I of ERISA. As a condition of receiving federal tax returns and return information, DOL must establish and maintain, to the satisfaction of the IRS, certain safeguards designed to prevent unauthorized uses of the information and to protect the confidentiality of that information.

* * * *

Tax returns and return information may be disclosed only to the extent necessary to conduct an investigation or prepare for litigation. Among those persons to whom returns and return
information may be disclosed for such purposes are other DOL employees, employees of other federal agencies, and court reporters.

** * * * * *

c. If during any investigation, the RD [Regional Director] or DS [District Supervisor] believes that information in the possession of the IRS will help in carrying out the provisions of Title I, a written request for such information may be made to the IRS using the format found in Figure 4.

** * * * * *

9. Release of Documents to Other Government Agencies

At times, another government agency may request documents from EBSA. If there is a Memorandum of Understanding (MOU) with that agency, the procedures identified in the MOU should be followed. If there is no MOU, the other agency should submit an access request letter to EBSA. If appropriate, the agency and EBSA should execute a common interest agreement.

** * * * * *

G.  From Enforcement Manual, Chapter 30, on “Complaints”:

1. **Complaints.** A complaint refers to information received which indicates or alleges that a violation of the law has occurred or is about to occur. Complaints may be specific or nonspecific, written or oral, within or outside EBSA’s jurisdiction and may come from a number of sources, such as individuals, news media, and other enforcement agencies.

2. **Complaints From Individuals.** Inquiries and complaints from members of the public are generally handled by EBSA’s Benefits Advisors in accordance with the procedures established by the Office of Outreach, Education and Assistance. When appropriate, a participant complaint may be transferred as an investigative lead to the enforcement unit. If a participant complaint is the source of an investigative lead, interim contact with the participant should be made by the investigator or the Regional Director’s designee as long as the complaint remains unresolved. Final notification to the participant should be made upon completion of the investigation and documented in the case file.

3. **Nonspecific Complaints.** If the information is indefinite, general in nature, grounded in rumor or conjecture, or alleges activity which does not constitute a violation of law, the complaint is "nonspecific." Generally, investigations will not be conducted on nonspecific information. However, a number of such complaints relating to the same person, entity, or subject matter, received over a period of time, may indicate the need for investigation because the cumulative effect of such complaints may form the basis for conducting the investigation.

4. **Confidentiality of Complaints.** If the complainant requests confidentiality, the complainant will be identified as a "Confidential Source" and described as to the degree of reliability, such as "who has furnished accurate information in the past" or "of unknown reliability" in a memorandum that is included in the case file. The complainant's name will only appear in the original written complaint or an original memorandum relating to an oral complaint, which is to be kept in the RD's [Regional Director's] or DS's [District Supervisor's] safe. No complainant, particularly when the complaint concerns a benefit dispute, can be guaranteed confidentiality. The most that can ever be stated is that we will attempt not to make disclosure unless required by law. Similar protection will be afforded to government agencies which request it, making reference to "Confidential Source A, a U.S. government agency" or "Source D, a municipal agency," etc.

5. **Information from Other Agencies.** Information received from some agencies, such as the FBI, is released to the requesting agency only upon the condition that the information is not to be released to other agencies without prior permission of the contributing agency. The IRS, by law, is compelled to consider tax return information to be confidential (IRC section 6103). Any information obtained from the IRS as authorized by IRC section 6103 shall be kept confidential and not released outside EBSA or the Solicitor's Office without prior permission of the Commissioner of
Internal Revenue. IRC section 7213 provides severe penalties including criminal sanctions for unauthorized disclosure. Information obtained from the IRS should not be discussed with anyone, even within the Department, other than on a need-to-know basis. See Chapters 12 and 20 for further details in dealing with information obtained from the IRS.

7. **Anonymity of Complainant.** Even though a complainant does not request to be treated as a confidential informant, it is EBSA policy not to disclose the complainant's identity during the course of an investigation unless such disclosure is required by law. This does not apply to an individual who is requesting help from EBSA in obtaining an individual benefit.

* * * * *

9. **Complaints of Violations of Other Laws.** ROs [Regional Offices] or DOs [District Offices] in possession of information pertaining to potential violations of laws enforced by other agencies, federal or state, will refer such matters to the appropriate agency. ROs should only refer to other agencies those complaints which do not involve potential plan violations. If a potential plan violation, as well as some other violation, is involved, and the RD is uncertain as to proper disposition of the matter, the case should be referred to OE for appropriate action. Referrals to the PBGC should be made through DFO.

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H. From Enforcement Manual, Chapter 31, on “Conducting and Documenting Interviews”.

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15. Introduction by Investigator/Auditor and Initial Notifications/Warnings Preliminary to Interview

a. Civil Program Cases (Program 48 and Program 53). Investigators/Auditors must clearly identify themselves to subjects of interviews (interviewees). Investigators/Auditors are required to carry credentials and have them available for inspection when conducting interviews. When introducing themselves, investigator/auditors should display their credentials, or credentials and badges, as appropriate, but should always maintain adequate control of their credentials and badges. However, if the interviewee requests, the credentials must be shown. The interviewee must be informed that the interview being sought is pursuant to an official investigation of EBSA under the authority of the Employee Retirement Income Security Act of 1974, as amended, and that the interviewee's voluntary cooperation is being requested. The interviewee must also be informed that if the Investigator/Auditor discovers any information which may involve violations of other laws, EBSA will refer the matter to the U.S. Department of Justice or other appropriate agency. See Tab [A] for EBSA Form 202.

b. Criminal Program Cases (Program 52). In criminal case interviews, Investigators/Auditors must also clearly identify themselves. Investigators/Auditors are required to carry credentials and have them available for inspection when conducting interviews. When introducing themselves, investigator/auditors should display their credentials, or credentials and badges, as appropriate, but should always maintain adequate control of their credentials and badges. However, if the interviewee requests, the credentials must be shown. The Investigator/Auditor should seek the voluntary cooperation of the interviewee. The investigator is to advise that he/she is conducting a criminal investigation pursuant to the Employee Retirement Income Security Act of 1974. The interviewee must also be informed that any information obtained may be referred to the U.S. Department of Justice or other appropriate agency. See Tab [B] for EBSA Form 202A.

Investigators/Auditors are not required to advise interviewees of their rights in non-custodial situations unless requested to do so by the U.S. Attorney's Office. However, in those circumstances where a person is either in governmental custody or reasonably believes himself/herself to be in such custody, he/she must be advised of his/her rights. See EBSA Form 202B.

1. Advisement of Rights. Custodial subjects of criminal investigations must be advised of their rights as follows:

a. You must understand your rights before we ask you any questions.
b. You do not have to make any statement or answer any questions.
c. Any statement you make or any answers you give may be used against you in a court of law or other proceedings.

d. You have the right to talk to a lawyer for advice before you answer any questions and you have the right to have a lawyer present during the interview.

e. If you decide to answer questions now without a lawyer present, you still have the right to stop the interview at any time.

2. Waiver of Rights. In addition to giving the advisement of rights, the Investigator/Auditor should attempt to obtain a "waiver of rights" from the criminal subject immediately thereafter, if the subject indicates a willingness to allow the interview to continue. The "waiver of rights" language should be read to the custodial subject after which he/she should be asked to read and to sign the document. (Figure 3 is to be used for this purpose.) If the custodial subject agrees to be interviewed but does not agree to sign the "waiver of rights" form, the interview should continue. In the event that the custodial criminal subject indicates either before or during the interview that he/she wants a lawyer present, the interview must stop and not be resumed until the subject's lawyer is present.

Sometimes EBSA assists other law enforcement agencies in criminal investigations. In those circumstances, the Investigator/Auditor may follow the lead agency’s interview procedures.

16. Third Parties Present During An Interview. Ordinarily the Investigator/Auditor should assure that only the interviewee and the interviewee's attorney are present during an interview. Third parties, other than attorneys who represent the witness, do not have the right to attend interviews conducted by an EBSA Investigator/Auditor during the course of an investigation. EBSA investigations are not public, and the only person(s) entitled to be present at interviews are the person(s) being interviewed and their representatives. If an Investigator/ Auditor asks a third party to leave the room at the beginning of the interview, and the third party refuses, the interview should be terminated and the witness subpoenaed for an administrative deposition.

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22. Signed Statements. As circumstances dictate, a signed, written statement may be obtained from an interviewee. The preface of such a statement will, like an RI, reflect identifying information about the interviewee, will indicate that appropriate notifications or warnings have been given by EBSA personnel, and will indicate the voluntary nature of such statements. See Figure 8 for a sample signed statement.

The body of the signed statement need not follow a prescribed form. It should contain a complete account of all the pertinent information known to the maker relevant to the alleged violation. The maker of the statement may be permitted to write it or dictate it to a stenographer, or the Investigator/Auditor may write it for the maker, being careful to keep it in the maker's own words. After the complete statement has been prepared and is ready for signing, the maker will be given the opportunity to make corrections or deletions. When corrections or deletions are made, the maker will be requested to initial each such
correction. In order to prevent subsequent insertions or deletions, each page will be numbered in sequence and initialed by the maker of the statement. When hand-written, no space should be left between paragraphs and the entire width of each page should be used.

The concluding paragraph of the signed statement should contain an attestation which declares that the person has read, or has had read to him/her, the statement which consists of a certain number of pages, that each page (which has been numbered) and each correction has been initialed by him/her and that the statement is complete and true to the best of his/her knowledge. The signature of the maker, placed after this paragraph, should be the same as the name identifying him/her in the heading of the statement. Each person witnessing the execution of the statement should sign as a witness. When available, fellow Investigators/Auditors will witness the statement. Both the maker of the statement and the witness to the execution of the statement should date their respective signatures.

No copy of the signed statement will be volunteered to the person furnishing the statement. However, if the person or his/her attorney requests a copy of the statement, a copy will be furnished. Signed statements will be maintained in the same manner as RIs [Report of Interviews].

23. Personal Observations. When an Investigator/Auditor determines that it is necessary to record observations of the credibility, dependability, or availability of potential witnesses for the assistance of SOL [Office of the Solicitor] and others in evaluating the litigation potential of cases, these observations are to be set forth in a separate memorandum to the file entitled "Evaluation of Witnesses." Such comments will be kept to a minimum and expressed in the most objective manner possible; they must never appear in an RI or the body of an ROI.

During the course of an investigation, the Investigator/Auditor should be alert to observe and report any information material to the inquiry at hand, such as the disorder of records, books, the contents of a safe deposit box, and so on. Such evidence is direct testimony, relevant and material to the issue, and may therefore be testified to by the Investigator/Auditor. Accordingly, such information is to be reported by a separate memorandum to the file.

24. Attorneys-at-Law

a. Civil Program. Investigators/Auditors should offer no objection to the presence of an attorney representing the interviewee during the interview of a civil case witness or subject. He/she should keep in mind that in an interview of a person represented by counsel, the attorney may also represent a potential defendant. Under these circumstances, Investigators/Auditors will exercise caution to avoid disclosure of EBSA’s case. Similarly, in interviews conducted in the presence of attorneys, Investigators/Auditors will not engage in arguments as to interpretations of the law, the facts of the case, or matters of procedure. If the attorney seeks to take charge and control the scope and progress of the investigation, the interview will be courteously discontinued. When an interview is discontinued under the above circumstances, the
Investigator/Auditor will apprise his/her supervisor of the fact at the earliest opportunity. Attorneys may advise their clients, but may not reply for them. If, in isolated cases, an attorney does reply for his/her client, the interviewee should be asked for his/her own answer. If significant, the answer of the attorney should also be reflected in the report of interview.

b. Criminal Program. As noted above in paragraph 4, custodial subjects in criminal investigations have a right to have a lawyer present during an interview. Considerations similar to those in paragraph 11.a. still pertain in such interviews, particularly with respect to having the interviewee answer for him/herself. Witnesses and non-custodial subjects in criminal cases will be given the same consideration as are civil program witnesses/subjects, i.e., no objection will be made to the presence of an attorney representing the interviewee during the interview.

25. Recording, Transcribing, and Monitoring of Conversations and Statements

a. Policy. DOL policy is that all internal and external business be transacted in an atmosphere of complete candor. Accordingly, statements or conversations made in person or over the telephone must not be secretly recorded, transcribed, or monitored.

b. Restrictions. In accordance with the above policy, the following restrictions apply:
   1. Unless otherwise authorized by a court, the use of electronic or mechanical recording and monitoring devices in conjunction with two-way telephone conversations is prohibited. Telephone recording devices may not be used except for purposes of receiving messages on automatic answering equipment or, where voice over Internet Protocol (IP) is used, for purposes of administering communications devices or filtering and logging certain types of traffic to mitigate potential security vulnerabilities.
   2. The use of electronic or mechanical recording devices in conjunction with meetings, teleconferences, interviews, and conversations is prohibited unless notification has been given to all participants that such devices are being used, and all parties agree to such use, or unless authorized by a court order.
   3. Monitoring of telephone conversations by secretaries or other personnel for purposes of confirming appointments, making arrangements, assisting with commitments, and assuring adequate follow-ups will be permitted only after notification to callers that such monitoring is taking place.

26. Administrative Depositions. Administrative depositions are recorded by court stenographers and are taken under oath; consequently, the use of RIs or signed statements is not required. In some instances, an administrative deposition may be taken by an Investigator/Auditor without a government attorney being present. Prior consultation with SOL is required in such instances. In these circumstances special care should be taken to employ good interviewing techniques to insure a sound product. (See Chapter 33 re: administrative depositions.)

* * * * *
I. From Enforcement Manual, Chapter 33, on “Administrative Subpoenas”:

1. Statutory Authority - ERISA Section 504(c). For the purposes of any Title I ERISA investigation, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, records, and documents) of the Federal Trade Commission Act (15 U.S.C. §§49 and 50) are applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him. These provisions give the Secretary 1) the authority to administer oaths, 2) the power to compel the attendance of witnesses, and 3) the access to and the right to copy documentary evidence.

2. Subpoena Duces Tecum. A subpoena duces tecum is a command to a person or organization to appear at a specified time and place and to bring certain designated documents, to produce the documents, and to testify as to their authenticity as well as any other matter concerning which proper inquiry is made.

3. Subpoena Ad Testificandum. A subpoena ad testificandum is a command to a named individual or corporation to appear at a specified time and place to give oral testimony under oath. A verbatim transcript is made of this testimony.

4. Accommodation Subpoena. An accommodation subpoena is a subpoena issued to persons or entities who are willing to testify or to produce the documents requested but are concerned about protecting themselves from any potential adverse consequences of doing so without a legal requirement.

   * * * * *

11. Subpoena Enforcement. In any case in which a subject fails to respond properly to a subpoena, the subpoena should be judicially enforced by the RSOL [Regional Office of the Solicitor] or PBSD [Plan Benefits Security Division, Office of the Solicitor] unless 1) the subpoena was improperly served, 2) the subpoena was altered or in some other way voided, 3) its approval and signature were based on erroneous information, or 4) events which have transpired after the subpoena's approval have changed circumstances to an extent that makes enforcement inappropriate.

   * * * * *

12. Administrative Depositions

   a. Uses. The Investigator/Auditor must be alert to situations in which sworn testimony will be useful. Such situations include instances:

      1. where a matter is likely to be referred for litigation;
      2. where testimony is the only evidence available to establish a necessary element of proof;
      3. where there is a need to obtain a clear and definite statement from a witness;
4. where there is a reasonable likelihood that an important witness will be unavailable at the time of discovery or trial;
5. where a critical witness refuses to voluntarily speak to an Investigator/Auditor; and
6. where it is important to have a clear explanation of a complex factual or technical matter.

* * * * *

c. **Arrangements.** The deposition will usually be taken in the RO [Regional Office] or DO [District Office] unless the witness and the Investigator/Auditor agree upon another location. The deposition should be taken in a room large enough to accommodate at least two questioners, the witness, the witness's attorney, if any, and the court reporter. Privacy should be assured during the taking of the deposition. It is the responsibility of the Investigator/Auditor to arrange for a court reporter.

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13. **Custody of Documents.**

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a. **Copies of Documents.** If the subpoenaed individual wishes to provide only copies and not original documents, this may be acceptable in many situations if the individual is willing to pay copying costs.

b. **On Site Inspection of Documents.** If the subpoena calls for a large number of documents, the production of which could interfere with the normal functioning of the subpoenaed subject, arrangements may be made to allow access to the subpoenaed documents in a manner less burdensome to the subpoenaed party. For instance, if the circumstances are appropriate, the originals may be kept in the subject's office with a written agreement that the Investigator/Auditor can have access to the documents at a particular place during specified hours, and with no interference. The written agreement should also include a clause allowing access to the documents in the future. If the documents are to be inspected on site, prepare an index of all the documents produced.

c. **Receipts for Books, Records, and Documents.** When it is necessary to take possession of documentary evidence or property such as books, records, canceled checks, bank statements, receipt books, invoices, vouchers, letters, memoranda, or other materials provided pursuant to a subpoena or furnished voluntarily by an organization or individual, a signed, dated, and itemized Document Receipt, EBSA Form 220A, for the material should be provided upon request. If such receipt is provided, retain a copy of the receipt in the case file.

d. **Return of Documents.** Upon return of the described documents to the owner or responsible individual, ask for the return of the original receipt and have the party receiving the documents acknowledge in writing such return. See EBSA Form 220B, Return of Documents.
15. Administrative Subpoenas Used in Criminal Investigations. ERISA Section 504(c) gives the Secretary, or the Secretary's designee, authority to use administrative subpoenas in conducting investigations of violations of Title I of ERISA. Section 506(b) of ERISA gives the Secretary the power to investigate and refer potential civil and criminal violations of Title I of ERISA and Title 18 of the United States Code that relate to employee benefit plans.

EBSA issues only subpoenas duces tecum, as either accommodation or non-accommodation subpoenas, in its criminal investigations. The purpose of subpoenas duces tecum is solely to acquire documents. A subpoena duces tecum is a command to a person or organization to appear at a specified time and place and to bring certain designated documents, to produce the documents, and to testify as to their authenticity. The agency does not use subpoenas for witness testimony in criminal cases.
J. **From Enforcement Manual, Chapter 34, on “Voluntary Compliance Guidelines”:**

1. **Purpose.** In order to implement the EBSA policy of promoting voluntary compliance with ERISA, the following program guidelines have been prepared for use by the EBSA field offices. It is expected that field staff will actively seek to achieve voluntary resolution of all violations of ERISA within the parameters established in these guidelines.

    * * * * *

3. **Delegation of Authority to the Field.** Listed below are the delegations of authority to the field regarding voluntary compliance.

   a. RDs [Regional Directors] have the authority to permit Investigators/Auditors to discuss their findings with plan officials during an investigation, provided that the officials are advised that the matters discussed (1) represent only the views of the Investigator/Auditor; (2) are subject to review by higher authority; and (3) will be confirmed in writing by EBSA. While it will be useful to discuss with plan officials their position and intentions regarding actions they might take voluntarily to correct violations, RO [Regional Office] personnel, other than the RD, generally should not propose corrective actions or discuss tentative settlement terms.

   b. After consultation with the RD, Investigators/Auditors may discuss with plan officials proposed corrective actions and the civil penalty process at the conclusion of the investigation. The Investigator/Auditor, however, may not discuss specific dollar amounts related to the proposed corrective action or any civil penalty that might be assessed as a result thereof. All discussions with plan officials which relate to findings or proposed corrections must be memorialized in writing by the Investigator/Auditor as soon after the discussion as possible. The memorandum should be included in the case file.

   c. RDs have the authority to issue all VC [Voluntary Compliance] notice letters and to close cases if they meet the guidelines in this chapter.

4. **Types of Cases which are Appropriate for Voluntary Compliance.** Subject to the restrictions set forth in paragraph 5 of this chapter, most issues may be suitable for voluntary compliance. Moreover, benefit disputes, bonding, reporting, and disclosure issues are almost always appropriately handled by voluntary compliance.

5. **Types of Cases Which Are NOT Appropriate for Voluntary Compliance.** For enforcement policy purposes, certain types of cases are not suitable for voluntary compliance. These include the following:

   a. Cases in which the time for proposed correction of violations will exceed a one year period, unless approved in advance by OE/DFO [Office of Enforcement/Division of Field Operations].

   b. Civil cases in which the violations involve potential fraud or criminal misconduct by a person or entity with respect to dealings with a plan. An exception to this general rule is that voluntary compliance may be undertaken if the appropriate U. S. Attorney (USA)
has been consulted and has agreed to a settlement by voluntary compliance. Voluntary compliance may proceed upon receipt of a written concurrence from the USA. In the instance of the USA’s oral concurrence, the RD should confirm the agreement in a letter to the USA.

c. Cases in which removal of a fiduciary or a related entity may be warranted will generally require legal action. Issues other than the removal may be pursued through voluntary compliance if appropriate.

6. Types of Cases in Which Voluntary Compliance May Not Be Appropriate. Voluntary compliance may not be suitable in the following types of cases.

a. Cases involving novel or interpretive legal issues or cases which involve complex fiduciary violations or complex part 7 violations.

b. Cases which involve individuals previously determined to have violated ERISA or other federal statutes.

It is important to remember that these are intended as general guidelines. In deciding which course of correction to utilize, the RD should weigh the presence or absence of each of the factors as well as the applicable civil penalties and make a case-by-case determination. ROs are encouraged to consult with OE/DFO when in doubt. See paragraph 7 of this chapter for procedures to follow in resolving questions as to the proper course of correction.

* * * * *

8. VC Notice Letter

a. VC Notice Letter - General. A VC notice letter advises plan fiduciaries or others of the results of an investigation, including which section(s) of ERISA have been violated, and requests corrective action. The letter does not threaten litigation (Figure 1).

1. 502(i). In situations where the RD believes that voluntary compliance may be achieved, and a 502(i) civil penalty is assessable, the RD should discuss the case with OE/DFO before issuing a VC notice letter. Footnote 5, (Figure 1) provides language to preserve the Department’s ability to assess the 502(i) civil penalty in cases where a VC notice letter precedes the assessment of the penalty. All 502(i) assessment letters are issued by OE. Chapter 35, Figure 1 is an example of a 502(i) assessment letter.

2. 502(l). ERISA section 502(l) language should be added to any voluntary compliance notice letter (1) which is addressed to a fiduciary with respect to the plan or to a knowing participant in a fiduciary breach, (2) which involves a violation of part 4 of Title I of ERISA, and (3) which contemplates a monetary recovery to the plan (Figure 1).

b. VC Notice Letter – Part 7 Violations. Fiduciaries are to be advised in writing of findings of part 7 violations. Exceptions to this should be discussed with OE.
c. **Interim Correspondence.** When a VC notice letter is issued containing ERISA section 502(i) or 502(l) language, all interim correspondence should include language which preserves the Department's ability to assess the civil penalties. The admonition may be worded in the following manner: "If you take proper corrective action the Department will not bring a lawsuit with regard to these issues. However, as pointed out in my previous letter dated ______________, ERISA section 502(l) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violations of, part 4 of Title I of ERISA or any other person who knowingly participates in such breach or violation."

9. **Acceptable VC Settlement Terms.** The RO should confer with OE/DFO before accepting terms of

a. Repayment to the plan must be made over a period of no longer than one year.\(^1\) In instances in which the statute of limitations will toll before the terms of the settlement agreement are completed, the RO must obtain a tolling agreement, which expires six months after the repayment period terminates;

b. Interest on repayments should be at appropriate rates;

c. All notes must be adequately secured; and

d. Regions should seek some form of commitment for future compliance. If future compliance cannot be assured, the RO will determine if further action is appropriate, and may include discussions with OE/DFO and SOL [Office of the Solicitor].

Recovery, for voluntary compliance and 502(l) purposes, includes amounts paid to the plan which represent losses incurred by the plan, disgorged profits, and amounts necessary to achieve correction. This amount will be determined as a part of the "settlement agreement" with the party.

At the RD's discretion, cases involving a final written settlement agreement, including the monetary settlement of a 502(l) civil penalty, may be discussed with OE/DFO staff prior to signature by the Department representative. When the RO seeks guidance from OE/DFO related to the assessment of a 502(l) penalty, the following documentation should be submitted:

a. A copy of the draft 502(l) assessment letter. The RO should use (Figure 2) as a model for 502(l) civil penalty assessment letters. In situations where consent decrees have been executed, a modified assessment letter can be issued (See Chapter 35, Figure 2);

b. A worksheet indicating how the applicable recovery amount was determined and how the 502(l) penalty was computed;

c. Proof that payment of the applicable recovery amount was actually made to the plan;

d. A copy of the Settlement Agreement; and

e. A copy of the voluntary compliance notice letter and all subsequent correspondence.

10. **Prohibited Transaction Class Exemption 94-71.** Prohibited Transaction Class Exemption 94-71 (PTE 94-71) [59 FR 51216 (October 7, 1994)] applies to certain
prospective transactions involving employee benefit plans and parties in interest where such transactions are specifically authorized by the Department pursuant to a settlement agreement. The exemption provides relief for a prohibited transaction entered into by plan fiduciaries as part of voluntary action taken to avoid litigation with the Department following an investigation. The exemption covers transactions that would otherwise violate ERISA §§406(a)(1)(A) – (D), 406(a)(2), 406(b)(1) and 406(b)(2). These transactions or activities must be described in a written settlement agreement which resulted from an investigation of a plan by the Department. Affected participants and beneficiaries must be provided with advance notice of the proposed transaction at least 30 days prior to the execution of the settlement agreement. PTE 94-71 is not intended to serve as a retroactive exemption for transactions that are in progress or have already occurred at the time of settlement with the Department.

PTE 94-71 is similar in form and purpose to PTE 79-15 which provides exemptive relief for certain transactions authorized or required by judicial order or by a judicially approved settlement decree where the Department or the Internal Revenue Service has been a party to the litigation. The underlying reason for both exemptions is to facilitate the settlement process by eliminating the need for an individual exemption. The exemption does not provide exemptive relief for the underlying violation, but only for the corrective action. Accordingly, ERISA §502 penalties and IRS excise taxes remain applicable.

a. Relief Provided. PTE 94-71 provides relief for prospective prohibited transactions or activities involving employee benefit plans which are:

1. specifically authorized by the Department, after conducting an investigation, in accordance with the voluntary compliance guidelines found in Chapter 34 of this Manual;
2. described in a written settlement agreement which specifically details the nature of the transaction to be entered into, and to which the Department is a party, following the Department’s investigation; and,
3. described in notices which must be given to the affected participants and beneficiaries by the party who will be engaging in the transaction or activity, at least 30 days prior to the execution of the settlement agreement.

b. Types of Prospective Transactions Covered Without OE [Office of Enforcement] Approval. PTE 94-71 contemplates certain transactions for exemptive relief, typically transactions that involve sales of property (real or personal) between a plan and a party in interest.

c. Types of Prospective Transactions Requiring OE Approval. Prior OE approval is required before authorization for the following sale and loan transactions:

1. Any transaction described in Chapter 34, Voluntary Compliance Guidelines, which requires approval of OE.
2. Any transaction which, either by reason of the amount or the type of non-cash assets involved, does not have a clear relationship to the transaction that the RO has determined violates Title I of ERISA.
3. All transactions or activities that will exceed one year before completion.
d. **Safeguards and Conditions.** In negotiating the terms of an otherwise prohibited transaction or activity to be authorized by EBSA, the following conditions must be met.

1. For transactions that involve the sale of property (real or personal), securities, promissory notes, or interest in limited partnerships between a plan and a party in interest, the value of the asset to be sold must be determined by a relevant, third party source independent of all parties who have an interest in the settlement agreement. Without prior approval from OE, the valuations should not be determined by any parties who are the subject of a EBSA investigation or a defendant in a current ERISA-related legal action taken by the Secretary of Labor.
2. The plan may not pay any fees or commissions in connection with the transaction.
3. For transactions involving the sale of a promissory note to a party in interest, the plan should receive the greater of: (1) the fair market value of the note; or (2) the outstanding balance of the note plus accrued interest.
4. In the case of a sale or transaction involving the extension of credit to a party in interest, the plan should receive a rate of interest reflecting market rates for similar transactions. In addition, such repayment should be guaranteed by an adequately secured promissory note.
5. The field office authorizing the transaction or activity will monitor the transaction or activity to ensure that the terms of the transaction have been met.
6. The field office must determine that the transaction or activity is in the interests of the participants and beneficiaries of the plan, and is otherwise appropriate as part of the settlement of issues raised by the investigation.

e. **Settlement Agreement.** The settlement agreement pursuant to PTE 94-71 ([Figure 4](#)), is an agreement between the Department and a party or parties which addresses the transactions or activities. The exemption provides relief for corrective transactions specifically described in the settlement agreement which would otherwise violate sections 406(a)(1)(A) through (D), 406(a)(2), 406(b)(1) and 406(b)(2) of ERISA for transactions that are in the interest of the plan but would be prohibited. The Department must specifically agree to these transactions as part of a settlement of the issues raised in the voluntary compliance letter. The settlement agreement shall contain language to protect the Department’s right to pursue other issues raised in the VC letters, including the imposition of civil penalties assessed on the underlying transaction addressed in the settlement agreement.

f. **Notice to Participants/Beneficiaries.** The notice requirements to participants/beneficiaries specifically provide that affected participants and beneficiaries must be given notice of the proposed transaction(s) and of the opportunity to comment on the proposed transaction(s) ([Figure 5](#)).

The written notice must meet the following conditions:

1. The written notice and the method of distribution must be approved in advance by the field office that negotiated the settlement agreement.
2. The written notice must contain an objective description of the transaction or activity; the approximate date on which the transaction or activity will occur; the
address of the field office which negotiated the settlement agreement; and a statement apprising participants and beneficiaries of their right to forward their comments to the field office. The notice to participants and beneficiaries should include a statement that the Department will keep the identity of commenters confidential to the full extent permitted by law. Commenters, however, may elect to submit information anonymously.

3. The method used to furnish notice to interested persons must be reasonably calculated to ensure that interested persons will receive the notice. In all cases, delivery in person and delivery by first class mail to the party’s last known address will be considered reasonable methods of furnishing notice.

4. The written notice must be reasonably calculated to be received by affected participants and beneficiaries at least 30 days prior to the execution of the settlement agreement by the applicant seeking the prospective exemptive relief.

5. **ERISA §502 Civil Penalties and Excise Tax.** Granting an exemption will not affect the liability of any persons for the payment of any civil penalties imposed on applicable recovery amounts under ERISA §502 attributing to the underlying violation (Chapter 35). The parties to the alleged violation(s) will also remain liable for any excise taxes owing under section 4975(a) and (b) of the Internal Revenue Code with respect to transactions or activities cited in the voluntary compliance letter as prohibited under §406 of ERISA.

11. **502(l) Settlement Agreements.** A settlement agreement, pursuant to the Department's proposed regulation 29 CFR 2560.502l-1(e), is defined as an agreement between the Secretary and a person who the Secretary alleges to have committed a breach of fiduciary responsibility under, or other violation of any provision of, part 4 of Title I of ERISA pursuant to which a claim for such breach or violation is to be released by the Secretary in return for cash or other property being tendered to a plan, any participant or beneficiary of a plan, or the legal representative(s) of a plan or plan participant or beneficiary.

Settlement Agreement No. 1 (Figure 6) provides a written acknowledgement of both the agreed-upon correction amount and the amount of the 502(l) penalty to be assessed. Settlement Agreement No. 2 (Figure 7) also sets forth the agreed-upon correction amount, but preserves the right of the violator to contest the assessment of the 502(l) penalty and to petition the Secretary for a waiver or reduction of the civil penalty.

* * * * *

13. **Types of Closing Letters.** When it is determined that no further action will be taken with regard to a case, a closing letter should be issued. In instances when the RD determines that it is not advisable to send a closing letter, a notation will be made to the file and OE/DFO will be notified of the decision not to issue a closing letter. The following are types of closing letters that should be issued in the instances described.

a. **Closing Letter – No ERISA Violation Detected.** This letter will be issued in all cases in which no violations are detected. The same form letter will be used in all such cases (Figure 9).
b. **Closing Letter - No Action Warranted.** In some instances, it will be appropriate to issue a closing letter other than the pattern-closing letter (Figure 10). This letter would be appropriate and would be authorized only if there is no evidence of willful misconduct and one of the following criteria is satisfied:

1. The violations are **de minimis**, or
2. There are no actual or potential monetary damages to the plan.

Use of this letter would be appropriate when, e.g., an investigation disclosed a small prohibited transaction which had been reversed with no harm to the plan, or a plan failed to submit an accountant's opinion for a particular year but submitted one for all subsequent years. Unresolved reporting matters and the fact of their referral to OCA should be reflected in the closing letter.

c. **Closing Letter - Compliance Achieved.** The closing letter (Figure 8) will be issued after a VC notice letter has been sent, corrective action has been confirmed and either applicable penalties paid or the payment period has expired. In addition, (Figure 8) will also be adapted for use in situations where violations (1) have been discussed with plan officials at the conclusion of an investigation; (2) have been confirmed by the RD; and (3) have been or will be corrected by the plan officials pursuant to the discussions. Because no prior notice letter would have been issued under these circumstances, the closing letter must detail the violations as well as the specific corrective actions agreed to by the plan officials including 502(l) and 502(i) matters. In instances where penalties assessed have not been paid by the end of the payment period, (Figure 7) may be further modified.

d. **Closing Letter - Referral to the IRS.** In certain situations where no voluntary compliance has been attempted, and when the facts and issues do not appear to justify the commitment of EBSA resources, it may be appropriate to refer a case to the IRS for possible imposition of excise taxes. In cases where the RO determines that such a referral is appropriate, the plan will be so notified by a closing letter (Figure 11). Unresolved reporting matters and their referral to OCA [Office of the Chief Accountant] should be reflected in the closing letter.

e. **Closing Letter - Compliance Not Achieved.** This closing letter will be issued after a VC notice letter has been sent to plan fiduciaries and those fiduciaries have denied the facts disclosed in the investigation, have admitted the facts but deny the facts constitute a violation of ERISA, or have otherwise failed to comply with the terms of our notice letter (Figure 12). This letter will be used only in situations in which no enforcement action is contemplated and after consideration of all possible courses of action. Unresolved reporting matters and their referral to OCA should be reflected in the closing letter.

f. **Modified Closing Letters.** While a VC letter should be issued prior to correction, sometimes plan officials may correct a violation prior to receiving this letter. In this situation, it is important that the closing letter (Closing Letter – Compliance Achieved) include the same information that is normally included in the VC letter. The Modified Closing Letter should set forth the facts gathered during the investigation, including
the plan fiduciaries and parties in interest involved (if any), and identify the provisions of ERISA that were violated as a result of the described actions.

14. Action to be Taken When Voluntary Compliance Attempts Prove Unsuccessful in Whole or in Part. In all cases where voluntary compliance attempts prove unsuccessful in whole or in part, the RO must consider all possible courses of action within its delegated authority for resolving or closing the case. In the event the RO believes that the case merits litigation, the case should be referred to OE/DFO or to the RSOL [Regional Office of the Solicitor], as appropriate.

Cases may also be sent to OE/DFO for guidance on appropriate action to be pursued, which may include referral to SOL, referral to DOJ [Department of Justice], referral to the IRS for the imposition of an excise tax, assessment of the 502(i) civil penalty, or closing. In cases where partial compliance is achieved and the 502(i) civil penalty is applicable, the penalty shall be assessed on the applicable recovery amount.

In appropriate cases where voluntary compliance is not achieved, consideration should be given to disclosing the results of the investigation to affected parties, e.g., by sending them a copy of the closing letter. If the investigation arose as a result of a complaint by a participant, beneficiary or fiduciary with respect to the plan, disclosure may be made to that person unless the information to be disclosed was obtained pursuant to Rule 6(e), Federal Rules of Criminal Procedure, section 6103 of the IRC, the Department's agreement with the Federal Financial Institution Regulatory Agencies, or from some other source requiring confidentiality (see Chapter 20).

In instances when reporting violations pursuant to part 1 of ERISA were not corrected through voluntary compliance, these issues should be forwarded to OCA. See Chapter 53, item 13.b. If a referral is made to OCA prior to closing the investigation, the RO should indicate the status of the investigation at the time of the referral so that OCA can coordinate its review with other enforcement actions. It is particularly important to notify OCA when an independent fiduciary is appointed, and a possible

15. Duration of Voluntary Compliance Negotiations. Voluntary compliance negotiations should be conducted within a reasonable time period. While the length of the process will vary according to the circumstances of the particular investigation and the parties involved, generally there should be no long time lapses between initiation of voluntary compliance efforts and conclusion of any negotiations regarding compliance (although the corrective action may occur over a more extended period). Special care to avoid undue delay should be exercised when the investigation is likely to be referred for litigation if the voluntary compliance process proves unsuccessful.

Note: The attachments referred to in the Chapter above on Voluntary Compliance Guidelines (Figures 1-12) are attached to this outline in Appendix A.
K. From Enforcement Manual, Chapter 35, on “Civil Penalties”:

1. 502(i) Civil Penalty

   a. Statutory Authority. Section 502(i) of ERISA authorizes the Secretary to assess a civil penalty against a party in interest who engages in a transaction prohibited by section 406 of ERISA with respect to either an employee welfare benefit plan or a non-qualified pension plan. The civil penalty at ERISA section 502(i) is intended to complement, in the arena of welfare and non-qualified plans, the excise tax imposed on tax-qualified pension plans by section 4975(a) of the Internal Revenue Code.

   The Department’s regulation, at 29 CFR §2570, specifies the procedures to be followed for the assessment of a two-tiered 502(i) civil penalty and the circumstances under which EBSA’s findings and assessment may be contested. The first tier of the penalty may not exceed five percent of the “amount involved.” The second tier of the penalty, which is not more than 100 percent of the amount involved, applies only if the prohibited transaction is not corrected within 90 days after a final agency order.

   The sanctions under ERISA section 502(i) are designed to achieve correction of the prohibited transaction; therefore, the assessment of the civil penalty under section 502(i) adds a valuable tool for the implementation of EBSA’s enforcement program. Because the assessment of the civil penalty under section 502(i) is discretionary, the RO [Regional Office] should consider the assessment of the 502(i) civil penalty as one of several enforcement options.

   b. Notice. EBSA must notify a party in interest who has engaged in a transaction for which a 502(i) civil penalty is assessed of its intention to assess the 502(i) penalty. Because OE issues all 502(i) assessments, the RD [Regional Director] may wish to discuss situations involving potential 502(i) assessments with OE [Office of Enforcement] before a VC notice letter is issued. When a VC [Voluntary Compliance] notice letter is issued, the letter should include language preserving the Department’s ability to assess the Chapter 34, paragraph 8.

   c. Request for a 502(i) Assessment. All requests for the assessment of a 502(i) civil penalty should be sent to OE/DFO for processing. DFO [Division of Field Operations] will review the request and, if appropriate, prepare the notice of assessment of the 502(i) civil penalty. See (Figure 1) for an example of a notice of assessment.

   The RO should include documentation sufficient to substantiate the violations alleged in its transmittal to OE. Specifically, the RO should forward a copy of the VC notice letter, if issued, and other correspondence, including any responses to the VC notice letter, the ROI, and exhibits to support a finding of the prohibited transactions along with an accurate calculation of the civil penalty.

   d. First Level 502(i) Penalty. The first level penalty under section 502(i) is five percent of the amount involved which, in general, means the greater of the amount of money and the fair market value of property given or the greater of the amount of money and
the fair market value of property received as of the date the prohibited transaction occurred.

1. **Amount Involved.** When determining the amount involved, it is important to distinguish between situations which involve the prohibited transfer of ownership (generally, a sale or transfer of property) and the prohibited use of property (generally, the lease or loan of property). In those situations where ownership rights are transferred, the penalty is based on the greater of the fair market value of the property or the actual amount of money that changes hands. For situations involving the use of property or money, such as a lease or a loan, the Department has adopted IRS principles which provide that, when the use of property or money is at issue, the amount involved shall be the greater of the amount paid for such use or the fair market value of such use for the period for which the money or property is used. For example, in the situation of a prohibited loan, the amount involved will be the greater of the interest actually paid or the fair market interest for such loan. In the instance of a lease transaction, the amount involved will be the greater of the rent actually paid or the fair market rental value. In those situations involving compensation to a party in interest for services provided, the amount involved will be limited to any excess compensation paid.

2. **Discrete and Continuing Transactions.** When calculating the civil penalty, a distinction must be made between discrete and continuing prohibited transactions.

   1. **Discrete Transactions.** In the case of discrete transactions, such as sales of property, the first level of the civil penalty is assessed simply as five percent of the amount involved for each taxable year or portion thereof until the prohibited transaction is corrected or the penalty is assessed. The penalty on discrete transactions is calculated on an annual basis and is not prorated for a portion of the year; therefore, when a transaction is entered into in the middle of one year and/or the correction is achieved in the middle of a subsequent year, the amount of the penalty is the full amount for each of the two years.

   2. **Continuing Transactions.** In the case of a continuing prohibited transaction, such as a lease or a loan, a new transaction is deemed to occur on the first day of each year or portion thereof in which the transaction continues. Such characterization of continuing transactions gives rise to the assessment of an additional sanction for each year the transaction remains uncorrected.

In continuing violations, the amount involved in the transaction is prorated for the actual period the use takes place. In addition, where there is an uncorrected completed lease or loan, the amount involved is cumulative for each taxable year until correction or assessment of the penalty. The penalty on a continuing transaction is calculated on an annual basis, but is prorated for a portion of any year involved.

e. **Second Level 502(i) Penalty.** The second tier of the 502(i) civil penalty (100 percent of the amount involved) may be assessed in addition to the first level penalty if the prohibited transaction is not corrected within 90 days after a final agency order is issued with respect to such transaction.
The “amount involved” in the transaction, for purposes of the second level of the 502(i) penalty, is the highest fair market value during the correction period. In general, the correction period begins on the date the prohibited transaction occurs and ends 90 days after a final agency order.

f. 502(i) Appeals. Upon receipt of a notice of assessment, a party in interest who elects to contest EBSA’s findings and assessment may request a hearing before an administrative law judge (ALJ). In general, the party in interest may file an answer and request for a hearing with the ALJ within 30 days of service of process. The failure to file a timely answer will be deemed to be a waiver of the right to appeal as well as an admission of the facts alleged.

Unless otherwise waived, the party in interest may file an appeal to the Secretary within 20 days of the issuance of the ALJ’s final decision. Upon such appeal, the Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal. The Secretary’s review is not a de novo proceeding, but rather a review of the record established before the ALJ.

2. 502(l) Civil Penalty

a. Statutory Authority. ERISA was amended effective December 19, 1989, to provide for a mandatory civil penalty under ERISA section 502(l). In general, this section requires the Secretary to assess a civil penalty 1) against a fiduciary who breaches a fiduciary responsibility under, or commits a violation of, part 4 of Title I of ERISA or 2) against any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the “applicable recovery amount” paid pursuant to any settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary.

The Department’s interim regulation, at 29 CFR § 2570.8 et seq., specifies the procedures under which a penalty will be assessed, when an assessed penalty must be paid, and the circumstances under which the Secretary may waive or reduce a penalty. The same regulation, at 29 CFR § 2570.82I defines Secretary to include, pursuant to any delegation of authority by the Secretary, the Assistant Secretary for Employee Benefits Security Administration, Regional Directors for Employee Benefits Security Administration, or Deputy Regional Directors for Employee Benefits Security Administration.

b. Notice of Assessment. Subsequent to the payment of the applicable recovery amount pursuant to either a settlement agreement (See Chapter 34, paragraph 11) or a court order, the RO shall serve on the person liable for making such payment a notice of assessment (Notice) of a civil penalty equal to 20 percent of the applicable recovery amount. When the RO achieves the voluntary compliance settlement agreement, the civil penalty will be assessed by the RD as described in Chapter 34. When the correction is effected as a result of an order by a court in a judicial proceeding instituted by the Secretary, the order may include language assessing the 502(l) penalty. If not,
or if the payment is not to be made immediately (i.e., either a deferred payment or a
schedule of payments), the penalty will be assessed by the RD at the conclusion of the
legal action (Figure 2).

The Notice shall be any document, which contains a specified assessment in monetary
terms of a civil penalty under 502(l). The Notice will contain a brief factual description
of the violation for which the assessment is being made, the identity of the person being
assessed, the amount of the assessment, and the basis for assessing that particular
person that particular penalty amount.

c. Service of the 502(l) Assessment Letter. Service of the 502(l) assessment letter will
be made by delivering a copy to the person being assessed, by leaving a copy at the
principal office, place of business, or residence of such person, or by mailing a copy to
the last known address of such person. Service by certified mail is completed upon
mailing the notice; service by regular mail is completed upon receipt by the addressee.

d. Assessment of the Penalty. The 502(l) penalty is calculated as a percentage of the
amount paid to the plan or to a participant or beneficiary which represents losses
incurred by the plan, disgorged profits, and amounts necessary to achieve correction of
the ERISA violation. If correction is achieved without actual payment to the plan or to
a participant or beneficiary, no penalty may be assessed. An example of such action
might involve a fiduciary taking administrative action to prevent future violations.

In assessing the civil penalty, it is important to remember that the penalty may be
assessed only against fiduciaries and knowing participants in a breach or violation of
part 4 of Title I of ERISA. Moreover, under the interim procedural regulation at 29
CFR §2570.83(a), the civil penalty may be assessed only against the person who is
required by the terms of the judgment or the settlement agreement to pay the applicable
recovery amount. For example, if only one of a group of fiduciaries agrees to restore
losses to a plan pursuant to a settlement agreement, the civil penalty may be assessed
only against that fiduciary.

Additionally, in certain circumstances, the penalty may be assessed against fiduciaries
or knowing participants when the restitution to the plan is made on their behalf by a
third party. Specifically, the penalty may be assessed when such third party has no
independent obligation under ERISA to correct the violation(s).

e. Payment of the 502(l) Penalty. The party who has been assessed a 502(l) civil penalty
has 60 days in which to pay the assessed penalty, unless the party submits a petition for
waiver or reduction during the 60-day payment period. If the party does not pay the
502(l) civil penalty within the 60-day payment period, responsibility for the collection
of the overdue penalty rests with OPPEM. At any time prior to the expiration of the 60-
day payment period, the party may submit a written request for a conference with the
Secretary to discuss the calculation of the assessed penalty. This request for a
conference does not toll the 60-day period.
At the end of the 60-day payment period, if no petition for waiver or reduction has been submitted, the RO should send a copy of the assessment letter to OPPEM with a formal memorandum requesting that debt collection procedures be implemented. A copy of the memorandum should also be sent to OE/DFO.

f. **Petitions for Waiver or Reduction.** At any time prior to the expiration of the 60-day payment period, the party (petitioner) may petition the Secretary to waive or reduce the assessed penalty on the basis that (1) the petitioner will not be able to restore all losses to the plan or any participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted, and/or (2) the petitioner acted in good faith in engaging in the breach or violation. When a petition is submitted either prior to or during the 60-day payment period, the payment period will be tolled pending DOL consideration of the petition. The petitioner is entitled to a conference with the Secretary regarding each petition for waiver or the reduction of the civil penalty.

The petition for waiver or reduction of the penalty is to be submitted to the RD. If the petition is based in whole on financial hardship, a written determination of whether to reduce or waive the penalty on this basis will be made by the RD within 60 days of receipt.

If the petition is based in part on financial hardship and in part on good faith, the RD will make a written determination of whether to reduce or waive the penalty only on the basis of financial hardship within 60 days of receipt. Should the petitioner remain liable for any portion of the penalty after the RD’s written determination, the RD will immediately forward the petition to OED, and a copy to OE, for a determination of whether to reduce or waive the remaining portion of the penalty based on good faith.

g. If the petition is based in whole on good faith, the RD will immediately forward the petition to OED, with a copy to OE, for a determination of whether to reduce or waive the penalty based on good faith.

h. **Offsets against other penalties.** The interim regulation at 29 CFR §2570.86 provides that the 502(l) civil penalty assessed on a fiduciary or other person with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under ERISA section 502(i) or section 4975 of the Internal Revenue Code of 1986. The person on whom the penalty was assessed must provide proof that the offsetting penalty was paid before the Department will reduce the 502(l) civil penalty.

The entire IRS excise tax imposed on a person with respect to a transaction may offset the section 502(l) civil penalty imposed against the same transaction. The offset may include any part of the Internal Revenue Code section 4975 tax representing taxable years before the effective date of ERISA section 502(l) and any portion of the tax that represents pyramiding. The interest accrued on an excise tax assessment is not allowable as an offset to the section 502(l) penalty. The same reasoning applies in any instance when the Department has assessed an ERISA section 502(i) civil penalty against the same person for the same transaction.
Section 502(l)(4) permits only the identical parties on whom the IRS has imposed an excise tax to offset the excise tax against the 502(l) penalty.

i. **Compromise of 502(l) Penalty.** Pursuant to PWBA Order 4-01 Regional Directors were delegated authority and responsibility with respect to compromise of 502(l) penalties. The standards for compromising a 502(l) penalty are set forth in 31 CFR Part 902 (Federal Claims Collection Standards – Standards for the Compromise of Claims). The RD may compromise a penalty only when: (1) the case was referred to SOL for litigation; (2) the compromise is based on SOL’s written recommendation; and, (3) the penalty has not become a Final Agency Order. If the RD disagrees with SOL’s recommendation, the RD must obtain approval from the NO, through OE.

If the Notice of Assessment has become a Final Agency Order, the RD must obtain approval of the compromise from the NO, through OE and OPPEM.

j. **Write-off of 502(l) Debt.** EBSA may consider a debt write-off after a 502(l) penalty assessment has become a Final Agency Order, and thus a collectable debt to the government. The authority to write-off a debt has not been delegated; only the Deputy Assistant Secretary for Program Operations may write-off a 502(l) penalty debt. Any request for debt write-off will be referred to the RD for a recommendation on whether to reduce the penalty in whole or in part. The RD should ask SOL for a written analysis and recommendation. The RD should then forward all analyses and recommendations for handling the write-off to OE. After consultation with the RD and OPPEM, OE will prepare a proposed recommendation regarding the penalty write-off to DASPO.

* * * * *
L. From Enforcement Manual, Chapter 48, on “Fiduciary Investigations Program”:

1. Statutory Requirements. The Employee Retirement Income Security Act (ERISA) expressly confers upon the Secretary direct responsibility and authority to investigate fiduciary violations of Title I of ERISA. In accordance with that authority, Program 48 will be used to investigate violations involving ERISA, Title I, part 4, sections 402, "Establishment of plan"; 403, "Establishment of trust"; 404, "Fiduciary duties"; 405, "Liability for breach of co-fiduciary"; 406, "Prohibited Transactions"; 407, "10 percent limitation with respect to acquisition and holding of employer securities and employer real property by certain plans"; 409, "Liability for breach of fiduciary duty"; 410, "Exculpatory provisions; insurance"; 412, “Bonding”; and violations involving ERISA, Title I, part 7 which includes the following provisions:

- 701 Limitations on preexisting condition exclusion
- 702 Nondiscrimination based on health status
- 703 Guaranteed Renewability in multiemployer plans and MEWAs
- 711 Standards relating to benefits for mothers and newborns
- 712 Parity in Mental Health and Substance Use Disorder Benefits
- 713 Required coverage for reconstructive surgery following mastectomy
- 714 Coverage of dependent students on medically necessary leave of absence
- 715 Additional market reforms under the Affordable Care Act. This incorporates by reference Part A of Title XXVII of the Public Health Service Act, sections:
  - 2704 Prohibition on preexisting condition exclusions or other discrimination based on health status
  - 2711 No lifetime or annual limits
  - 2712 Prohibition on rescissions
  - 2713 Coverage of preventive services
  - 2714 Extension of dependent coverage
  - 2719A Patient protections
  - 2719 Appeals process

Additionally, Program 48 will be used to investigate plans which have been terminated but whose assets have not been allocated according to the provisions of sections 403(d)(1) and 403(d)(2) of ERISA. Section 403(d)(1) provides that terminated pension plans which are not subject to the PBGC insurance regulations will allocate their assets in accordance with the provisions of section 404 of ERISA. Section 403(d)(2) provides that terminated welfare plans shall distribute their assets in accordance with the plan documents.

* * * * *

4. Case Opening. Consistent with National and Regional priorities, Program 48 cases will be opened (a) when information is acquired by the field office, which indicates a past or
prospective violation of one or more of the ERISA sections set forth in paragraph 1 of this chapter or (b) when directed by the National Office.

* * * * *

5. **Complaint-Generated Cases.** Consistent with RO [Regional Office] priorities, the RO will open investigations as soon as practical after allegations of fiduciary or part 7 violations deemed worthy of investigation are received from plan participants, plan officials, employees, employee benefit plan practitioners, the general public, or other federal, state, or local governmental agencies.

6. **RO-Generated Cases.** Consistent with RO priorities, the RO will open a case when it acquires evidence of a possible fiduciary or part 7 violation from a review of its files, the plan's annual report, media information, or from any other applicable targeting approach.

* * * * *

13 **Fiduciary Violations Involving Gifts and Gratuities.** Investigations may disclose possible fiduciary violations involving a plan fiduciary’s acceptance, from a party dealing with the plan, of consideration such as meals, gifts, entertainment, or expenses associated with educational conferences. In such cases, the Investigator/Auditor should determine whether the facts support an allegation that the receipt of gifts, gratuities, or other consideration were for the fiduciary’s personal account and received in connection with a transaction or transactions involving the assets of the plan as required for a violation of ERISA §406(b)(3). The Investigator/Auditor should also determine whether the fiduciary or the plan maintained a reasonable written policy or plan provision governing the receipt of items or services from parties dealing with the plan and whether the fiduciary adhered to that policy.

Further, for enforcement purposes only, the Investigator/Auditor generally should adhere to the following guidelines:

1. The Investigator/Auditor should treat as insubstantial, and not as an apparent violation of ERISA § 406(b)(3), the receipt by a fiduciary (including his or her relatives) of the following items or services from any one individual or entity (including any employee, affiliate, or other related party) as long as their aggregate annual value is less than $250 and their receipt does not violate any plan policy or provision: (a) gifts, gratuities, meals, entertainment, or other consideration (other than cash or cash equivalents) and (b) reimbursement of expenses associated with educational conferences.

2. The Investigator/Auditor should not treat the reimbursement to a plan of expenses associated with a plan representative’s attendance at an educational conference as a violation of ERISA § 406(b)(3) if a plan fiduciary reasonably determined, in advance and without regard to whether such expenses will be reimbursed, that (a) the plan’s payment of educational expenses in the first instance was prudent, (b) the expenses were consistent with a written plan policy or provision designed to prevent abuse, (c) the conference had a reasonable relationship to the duties of the attending plan representative, and (d) the expenses for attendance were reasonable in light of the
benefits afforded to the plan by such attendance and unlikely to compromise the plan representative’s ability to carry out his or her duties faithfully in accordance with ERISA. The fiduciary’s determination should be in writing.

* * * *


* * * *

Widespread Compliance

In the health insurance industry, it is a common practice for issuers or other service providers to issue standardized plan documents and other material to ERISA plan clients. In order to leverage agency resources, EBSA will continue to identify service providers who are providing non-compliant health insurance policies or standardized plan documents and pursue global correction which will affect all plans governed by the faulty policies or plan documents.

* * * *
M. From Enforcement Manual, Chapter 53, on “Targeting and Limited Reviews”:

1. Purpose. The purpose of this chapter is to provide guidance in the use of targeting techniques and in the handling of limited review cases (Program 53) for pension plans and welfare plans other than health benefit plans. Health plan cases should be opened under Program 50. Targeting is the process whereby the limited investigative resources of EBSA are directed toward those plans and service providers with the highest potential for abuse, consistent with agency goals, objectives and priorities. Limited review cases are expedited inquiries into one or more specific facets of a plan or service provider's operation in order to determine quickly whether a violation exists and further investigation is merited or whether the matter should be closed.

2. Criteria. Enforcement strategies, annual operating plans, and National Office policy statements will provide direction to targeting efforts and may, from time to time, emphasize the review and investigation of financial institutions, service providers, specific sizes and types of plans, types of investments, or other specific matters. All targeting efforts will reflect, and be consistent with, such direction. Additionally, RO initiated targeting efforts which supplement national enforcement strategies, annual operating plans, and policy guidance should be considered for implementation by field offices. Supplemental efforts may reflect such factors as local economic conditions, geographical coverage within an RO/DO [Regional Office/District Office] jurisdiction, and specialized plan types.

3. Targeting

a. Sources for Potential Limited Review Cases.
   1. Computer generated compilations of selected employee benefit plans or service providers derived from reports filed with EBSA.
   2. Information derived from detailed review and analysis of annual reports, supporting financial statements, schedules, exemption application files, ERISA section 502 complaints, and other internal EBSA sources.
   3. Information concerning employee benefit plans or service providers derived from other governmental agencies such as the IRS, the SEC, and financial regulatory agencies.
   4. Information concerning employee benefit plans or service providers derived from non-governmental sources such as newspapers, industry journals and magazines, or leads from knowledgeable parties.
   5. Information received as a result of complaints from participants, fiduciaries, informants, or other sources in the community, other than allegations of acts against a participant or beneficiary for exercising any right to which he/she is entitled under the provisions of an employee benefit plan, or interfering with the attainment of any right to which the participant may become entitled, which should be handled as described in Chapter 43.
   6. Compilations of selected employee benefit plans or service providers derived by using combinations of the sources listed in (1) through (5) above.

1. An entire compilation of employee benefit plans or service providers can be targeted for limited review without further refinement of the initial compilation. Generally, this method will be used when the compilation itself is small. For example, an RO may request a printout from the National Office of all exemption applications granted, denied or withdrawn for plans having at least fifty (50) participants located within that RO's jurisdiction. Such a compilation would probably be small in number and, generally, would not require any additional analysis to afford a reasonably good basis for limited review cases.

2. More sizeable compilations can be refined through the use of "inquiry letters" (Figure 1) whereby certain additional information is obtained from employee benefit plan officials prior to opening a limited review case. Such inquiry letters, however, should be used with caution and only in a manner consistent with the guidelines in paragraph 4 below. Each RO using inquiry letters will review responses to such letters in order to determine which employee benefit plans appear to merit further review, either by opening a limited review case or through the use of additional case development efforts.

3. Telephonic contacts may also be used to assist in refining compilations in order to select specific cases for limited review. Such contacts may be used to further refine large compilations after receipt and analysis of "inquiry letters.”

4. Inquiry Letters. Inquiry letters are often a very effective initial contact with an employee benefit plan or service provider.

   a. Standardized Inquiry Letters. Standardized inquiry letters must be used with extreme caution because of the strict requirements of the Paperwork Reduction Act (PRA). The PRA prohibits the use of certain standardized letter requests for information without prior approval of the Office of Management and Budget. Inquiry letters containing requests for identical information may not be sent to more than 9 persons unless individual investigations have already been opened. Any standardized inquiry letter sent by the RO must be reviewed by DFO [Division of Field Operations] before it is sent.

   b. Telephone Calls. For the purpose of PRA, telephone calls are the same as inquiry letters. Follow-up calls should be made only after an initial inquiry letter is sent.

   c. Filing Inquiry Letters. Where the inquiry letters merely request data in support of particular information contained in a filing with the Secretary, such as a Form 5500, that has been the subject of EBSA review, the inquiry letter may request the creation of documents that contain such supporting data. For example, if an RO obtained a computer printout of the 100 employee benefit plans within its jurisdiction with the largest percentage of assets invested in real estate (as derived from the most recently available Forms 5500), that RO could prepare and distribute an inquiry letter to those 100 plans inquiring into and requesting an explanation of the specific nature of each plan's real estate investments after individual investigations have been opened for these plans (see Figure 1). The RO could not, however, request the creation of documents beyond that necessary to explain the entry on the Form 5500.
d. **Detailed Inquiry Letters.** Detailed inquiry letters may be used to request information beyond that which is necessary to support information required to be filed with the Secretary under Title I of ERISA only after an investigation has been opened. Such detailed inquiry letters may not request the creation of documents, but rather may request the production of existing documents. Figure 2 is an example of a detailed inquiry letter and requests information beyond that which is necessary to support an entry in a plan's Form 5500.

5. **Internally (EBSA) Obtained Information.** Each field office will maintain lines of access to information maintained in the National Office, such as filed reports and attachments, exemption application files, advisory opinion files, and Solicitor of Labor information.

6. **Routinely Available External Information.** The RO should, on a regular basis, initiate and maintain contacts with other governmental agencies (e.g., OLMS, OIG/OLR [Office of the Inspector General/Office of Labor Racketeering], IRS, FBI, SEC, U.S. Attorney's offices, and other appropriate agencies). The RO/DO also should develop and maintain current listings indicating the locations and responsible officials of important sources of records (e.g., federal and state court records, real estate and UCC filings, assessors' offices, and specialized libraries). Moreover, each RO/DO should routinely review media coverage compiled by its local Office of Public Information or reported in newspapers and industry journals, seeking to identify actual or potential items of enforcement concern.

7. **Relationship of Targeting to Limited Review Cases.** In making compilations for targeting purposes, in preparing inquiry letters, and in related case development work, Investigators/Auditors will normally charge their time to case development on EBSA Form 214. Once the targeting process has identified a potential target and the RO/DO decides to investigate that particular target, a limited review case should be opened. In those instances where the targeting process has uncovered a fiduciary issue, the RO/DO should open a fiduciary case (Program 48). It should be noted that, at the targeting stage, no commitment has been made under ERISA section 504 to conduct a limited review or fiduciary case.

* * * * *

10. **Limited Review Cases** (Program 53). Limited review cases will be undertaken to inquire into one or more specific issues or aspects of plan or service provider operation. The purpose of such an inquiry is to explore one or more specified matters quickly in order to determine whether a complete fiduciary investigation is warranted. Therefore, an Investigator/Auditor will not be expected to examine every aspect of plan/service provider operation, but only those matters, which formed the basis for the original case opening. The sole objective of a Program 53 case is to look at one or more issues and to determine whether to convert the case to a Program 48 case or to conclude the inquiry as quickly as possible.

* **Document Request Letters.** Document request letters may be used to request information beyond that which is necessary to support information required to be filed with the Secretary under Title I of ERISA only after an investigation has been opened. Such letters
may not request the creation of documents, but rather may request the production of existing documents. Figure 2 is an example of a document request letter and requests information beyond that which is necessary to support an entry in a plan's Form 5500.

* * * * *

13. Limited Review Case Dispositions (Program 53)

a. No Violation(s) Found. In those instances where the limited review case identifies no violations, a closing Checksheet ROI [Report of Investigation] will be prepared. Such ROIs will include sufficient narrative detail to describe the basis for the review, the area(s) reviewed, the documents reviewed, and the reason(s) for concluding that no violation(s) exists. See Form 203D, Form 203E and Form 203F for sample closing ROI formats. Employee benefit plan officials or appropriate officials of service providers will be informed of the results by letter. See Figure 5 for the pattern closing letter.

b. Violation(s) Found: Reporting and Disclosure, Administrative Practices, Corrected Prohibited Transaction(s). In those instances where the limited review case identifies violations in areas such as reporting and disclosure, improper administrative practices of a de minimis nature, or prohibited transaction(s) already corrected, the case should generally remain as a Program 53. The same closing ROI form used in no violation cases can be used provided that corrective action(s) taken are documented in the case file. Closing letters will be drafted in a manner which sufficiently details the violation(s) found and corrective action(s) taken, or to be taken.

In instances when reporting violations pursuant to part 1 of ERISA are discovered, and there are no other ERISA violations, the deficient report violation should be included in a voluntary compliance letter. The voluntary compliance letter should require the plan to correct the violation identified. If the plan fails to correct the deficient report violation as requested in the voluntary compliance letter and there are no other unresolved issues involved in the investigation which would mandate a referral for civil litigation, or in situations where there are unresolved issues but a decision has been made not to pursue the investigation, the investigation should be forwarded to OCA. The Regional Office may close the investigation at the time of transmittal. If a referral is made to OCA prior to closing the investigation, the RO should indicate the status of the investigation at the time of the referral so that OCA can coordinate its review with other enforcement actions. A closing letter, which details the reporting violation and contains the following notification, should be issued to the Plan Administrator:

You must be aware that the responsibility for the acceptance or rejection of any Annual Report (Form 5500) or any part thereof is delegated to the EBSA Office of the Chief Accountant (OCA). [The final decision whether the reporting violations described above have been adequately corrected will be made by the OCA pursuant to the federal regulations set forth at 29 C.F.R. 2570.61 et seq.] Accordingly, the reporting issues will be referred to the OCA for whatever action they deem appropriate.
This same language (without the sentence in brackets) should be included in all closing letters involving a plan that is required to file an annual report. If a referral is made to OCA prior to closing the investigation, the RO should indicate the status of the investigation at the time of the referral so that OCA can coordinate its review with other enforcement actions.

- **Apparent Violations Found: Conversion to Program 48.** If evidence of violations is uncovered, the Investigator/Auditor will notify his/her supervisor and consideration will be given to converting the investigation to a Program 48 case. An ROI is not required for the conversion. The conversion should be done in accordance with case management requirements. Special care should be given to ascertaining a reasonable administrative statute control date. If any substantial delay in conducting an on-site review in the Program 48 investigation is foreseen, the subject of the case should be advised in writing (see Figure 6).

- **Apparent Criminal Violations Found.** Whenever the limited review case uncovers evidence of possible criminal violation(s), the assigned Investigator/Auditor must apprise the group supervisor at the earliest possible time. Normally, the civil case will proceed and no investigation of the criminal case will be performed until the RD has decided whether and by whom such criminal investigation(s) will be conducted.

- **Apparent Violations of Participant Rights.** If the limited review discloses possible ERISA section 510 violations involving acts against a participant or beneficiary for exercising any right to which he/she is entitled under the provisions of an employee benefit plan, or interfering with the attainment of any right to which the participant may become entitled, a Program 43 case will be opened immediately.

- **Prohibited Persons.** Whenever the limited review investigation indicates that a person who is barred from serving as an employee benefit plan fiduciary or service provider because he or she has been convicted of certain crimes (see section 411 of ERISA) is acting in such a capacity, a Program 47 case will be opened.


a. Generally, other than stating that the purpose of the limited review is to determine whether a violation of Title I of ERISA has occurred or is about to occur, the Department has adopted the policy of not informing plan officials or others as to the basis of its investigation.
APPENDIX A

(Figure 1)

Sample VC Notice Letter

Certified Mail, Return Receipt Requested

Name
Address

Re: XYZ Plan
EBSA Case No. XX-XXXXXX

Dear :

The Department of Labor (the Department) has responsibility for administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operation of employee benefit plans such as XYZ Plan.

This office has concluded its investigation of the Plan and of your activities as its trustee. Based on the facts gathered in this investigation, and subject to the possibility that additional information may lead us to revise our views, it appears that, as trustee, you may have violated several provisions of ERISA. The purpose of this letter is to advise you of our findings and to give you an opportunity to comment before the Department determines what, if any, action to take.

As we understand the facts, many of which you provided to this office during the course of our investigation, on December 1, 2005, the Plan loaned $25,000 to Mr. Smith, who is a trustee of the Plan and a Plan participant. As a trustee of the Plan, Mr. Smith is a fiduciary within the meaning of ERISA section 3(21). In addition, as a Plan participant, Mr. Smith is a party in interest to the Plan within the meaning of ERISA section 3(14). This loan is unsecured and bears an interest rate of 5%. It is our view that this loan violates ERISA sections 406(a)(1)(B) and 406(b)(1) which provide:

406(a)(1)  A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect-

(B) lending of money or other extension of credit between the plan and a party in interest; and

406(b)  A fiduciary with respect to a plan shall not --

(1) deal with the assets of the plan in his own interest or for his own account.
In addition, our investigation has disclosed that (outline additional facts and violations as above).

In our view, for the reasons cited above, you are in violation of ERISA and will remain so as long as the loan in question remains outstanding. We invite you to discuss with us how these violations may be corrected, how losses may be restored to the Plan, and how future compliance can be achieved.

We have provided the foregoing statement of our views to help you evaluate your obligations as a fiduciary within the meaning of ERISA. Should you fail to take corrective action, this matter may be referred to the Office of the Solicitor of Labor for possible legal action. In addition to any possible legal action by the Department, you should also be aware that the Secretary, pursuant to section 504(a) of ERISA, is authorized to furnish information to "any person actually affected by any matter which is the subject" of an ERISA investigation. Further, even if the Secretary decided not to take any legal action in this matter, you would nonetheless remain subject to suit by other parties including plan fiduciaries and plan participants or their beneficiaries.

If you take proper corrective action the Department will not bring a lawsuit with regard to these issues. However, ERISA section 502(l) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of Title I of ERISA or any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the "applicable recovery amount", a term which means any amount recovered from a fiduciary or other person with respect to a breach or violation either pursuant to a settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary. Further, you should understand that the Department is speaking only for itself and only with regard to the issues discussed above. The Department has no authority to restrain any third party or any other governmental agency from taking any action it may deem appropriate.

We hope this letter will be helpful to you in the execution of your fiduciary duties, and that, in respect to the specific matters discussed, you will promptly take appropriate corrective action. Please advise me, in writing, within 10 days of the date of this letter what action you intend to take to correct the violation(s) described above.

Sincerely,

Regional Director

bcc: OE
Sample 502(1) Civil Penalty Assessment Letter

Certified Mail, Return Receipt Requested

Re: Notice of Assessment of ERISA Section 502(l) Civil Penalty in the Matter of (Name of Case)

EBSA Case No. ______________________

Dear Mr./Ms.:

As I pointed out in my previous letter dated ____________________, the Department of Labor (the Department) has responsibility for the enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operation of employee benefit plans such as the ____________________ Plan (the Plan).

As noted in the letter of (date), this office has concluded its investigation of the Plan and of your activities as ____________________. Based on the facts gathered during that investigation, we have concluded that, as ____________________, you violated your fiduciary obligations to the Plan and violated several provisions of ERISA. The specific actions taken by you that violated ERISA were detailed in my previous letter, a copy of which is enclosed and incorporated herein.

My previous letter offered you an opportunity to obtain a release from certain further action, other than the imposition of the civil penalty required by ERISA section 502(l), by correcting the ERISA violation(s) and restoring losses to the plan. Based on your letter-dated ____________________, [if applicable] we understand that you have taken such action in response to this offer. Specifically, you [detail actions taken].

Because you have taken the agreed-upon corrective action with respect to the specific violations detailed in my letter of (date), the Department will take no further action with respect to these matters, except the imposition of the civil penalty as required by ERISA section 502(l).

ERISA section 502(l) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of Title I of ERISA or any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the applicable recovery amount.

We have determined that the applicable recovery amount is $____________________, which was paid on ____________________. Based on the authority granted to the Secretary under section 502(l) of ERISA and the regulations thereunder, EBSA is assessing a civil penalty of
$____________________ against you. Please be advised that the payment of this civil penalty is an expense that is not tax-deductible under federal tax laws (26 U.S.C. 162(f)). If you want further information, please contact the Internal Revenue Service at 1-800-829-1040.

You have 60 calendar days from the date of this notice of assessment to pay the assessed amount. At any time prior to the expiration of that 60-day period, you may submit a written request for a conference to discuss the calculation of the assessed penalty. The 60-day payment period will not, however be tolled upon such request.

At any time prior to the expiration of the 60-day period, you may petition the Secretary to waive or reduce the assessed penalty, as explained in the attachment "Procedures Under ERISA Section 502(l)". If a petition for waiver or reduction is submitted during the 60-day payment period, the payment period for the penalty will be tolled pending Departmental consideration of the petition. The petition should be mailed to the following address:

Regional Director
Address

If you determine not to contest this matter, the payment should be remitted by check or money order in the amount of $____________________ payable to the United States Department of Labor. The check should be mailed to the following address:

U.S. Department of Labor
ERISA Civil Penalty
P.O. Box 71360
Philadelphia, PA 19176-1360

To ensure correct processing of this payment, please include the EBSA Case Number (listed at the top of this letter) on the front of your check, as well as a copy of this letter. You should also notify me that you have paid the civil penalty so that we may close our case. If you need to send your payment by overnight courier, please contact Soroosh Nikouei at 202-693-8486.

[Please also be advised that pursuant to section 3003(c) of ERISA, the Secretary of Labor is required to transmit to the Secretary of the Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will also be referred to the Internal Revenue Service. The penalty assessed under ERISA section 502(l) will be reduced by the amount of any tax imposed with respect to such transaction under section 4975 of the Internal Revenue Code, as further explained in the attachment "Procedures Under ERISA Section 502(l)".]

Sincerely,

Regional Director

Enclosures: Letter dated from Regional Director to ____________________ (voluntary compliance notice letter)

"Procedures Under ERISA Section 502(l)"

bcc: OE, OPPEM
(Chapter 35, Figure 2)

Certified Mail, Return Receipt Requested Mr. X, Trustee
Profit Sharing Plan
Main Street
Anytown, USA

RE: Notice of Assessment of ERISA Section 502(l) Civil Penalty in the Matter of (the Plan)

EBSA Case No. XX-XXXXX

Dear Mr. X: The Department of Labor (the Department) has responsibility for the enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operation of employee benefit plans such as the Plan (the Plan). This office has concluded its investigation of the Plan and of your activities as Trustee. Based on the facts gathered during that investigation we concluded that, as Trustee, you violated your fiduciary obligations to the Plan and violated several provisions of ERISA. The specific actions taken by you that violated ERISA were detailed in the Complaint filed January 31, 2000 against you and the Board of Directors in Federal District Court (1st Circuit), Secretary v. ______________________ , et al., Docket # ______________________ together with a Consent Judgment between the parties entered into by the Court on __________, 2000. The terms of the Consent Judgment require that you correct the ERISA violations and restore losses to the plan exclusive of the mandatory section 502(l) civil penalty to be assessed by the Secretary of Labor. Based upon the report of Mr. Y, the court approved independent party, we understand that you have complied with the above requirements. Among other things, you . . . (list corrective actions taken). Since you have taken the Court-ordered corrective action with respect to the specific violations detailed in the Consent Judgment, the Department will take no further action with respect to these matters except the imposition of the civil penalty, as required by ERISA section 502(l), in accordance with the Agreement signed by you on ______________. We have determined that the applicable recovery amount is $14,452.06, paid on ______________________, representing the loss to current participants. Therefore, based on the authority granted to the Secretary under section 502(l) of ERISA and the regulations thereunder, EBSA is assessing a civil penalty of $2,890.41 against you. The payment should be remitted by check or money order in the amount of $2,890.41 payable to the United States Department of Labor. The payment of this penalty is not tax-deductible. The check should be mailed to the following address:

U.S. Department of Labor
ERISA Civil Penalty
P.O. Box 71360
Philadelphia, PA 19176-1360
To ensure correct processing of this payment and final disposition of this case, please include the EBSA Case Number (listed at the top of this letter) on the front of your check, as well as a copy of this letter. You should also provide me with copies of the canceled check and this letter in order to document that you have paid the civil penalty so that we may close our case. If you need to send your payment by overnight courier, please contact Soroosh Nikouei at 202-693-8486. [Please also be advised that pursuant to section 3003(c) of ERISA, the Secretary of Labor is required to transmit to the Secretary of the Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will also be referred to the Internal Revenue Service. The penalty assessed under ERISA section 502(l) will be reduced by the amount of any tax imposed with respect to such transaction under section 4975 of the Internal Revenue Code.]

Sincerely,
Regional Director

Enclosures: Consent Judgment dated by the Court
Agreement dated

bcc: OE, OPPEM
Settlement Agreement

This Agreement, entered into by and between the United States Department of Labor, Employee Benefits Security Administration (EBSA) and the [Trustee (“the Trustee”)] of the ____________________ (“the Plan”) shall fully resolve and settle between these parties the following issues:

[Description of Transaction]

No other issues or violations cited in the [date] letter to the Trustee are subject to the terms of this agreement.

Having received the [date] letter, the Trustee has entered into negotiations with EBSA, and the parties have made the following representations:

1. EBSA continues to believe that the above-described transaction(s) violate ERISA Sections [provide relevant sections].
2. The Plan continues to [state violative actions].
3. ____________________ is a party in interest to the plan under section 3(14) of ERISA.
4. The Trustee proposes to correct this violation(s) by: [state corrective action], hereinafter referred to as “the Correction.”
5. No fees or commissions incurred in connection with the Correction will be paid by the Plan.
6. ____________________ is willing to [state activity].
7. The Correction would constitute a prohibited transaction under Section 406 or 407 of ERISA.
8. Written notice of the Correction was provided to the Plans’ participants and beneficiaries by [describe the method of delivery]. This notice advised the affected plan participants and beneficiaries of their right to forward comments on the Correction to EBSA. A copy of such written notice is incorporated into this Agreement as Exhibit ____________________.
9. EBSA is required to assess a civil penalty of twenty percent (20%) on amounts recovered pursuant to a settlement agreement or court order (“applicable recovery amount”), pursuant to ERISA section 502(l)(2), 29 U.S.C. Section 1132(1)(2).
10. The Trustee reserves all rights to contest the assessment and calculation of the civil penalty under ERISA Section 502(l), 29 U.S.C. Section 1132(l), and to petition the Secretary of Labor for a waiver or reduction of such civil penalty.
11. This Agreement is not binding on any governmental agency other than the U.S. Department of Labor.
12. This settlement agreement is limited to the transactions which are being corrected by the previously described Correction. This agreement shall not affect, in any manner, or for any
purpose, the Secretary’s claims with respect to any other issues, nor shall it affect the relief obtainable by the Secretary on these issues. Further, the Department notes that this settlement agreement does not provide relief for any penalties which may be imposed by the Department or the Internal Revenue Service on the underlying transactions or activities cited as violations by the Department.

Now, in consideration of such representations [the Trustees] and EBSA agree as follows:

I. ______________________ will [describe activity].

II. The Trustees shall provide to EBSA evidence of the Correction which is deemed sufficient by EBSA to ensure that the terms of this Agreement have been fulfilled.

III. EBSA will take no further enforcement action with respect to the Plan’s underlying violation which is the subject of this settlement agreement other than the imposition of any relevant civil penalties under ERISA section 502(l), 29 U.S.C. Section 1132(l). In the event that the representations made by the trustees in paragraphs 2, 4, 6, and 8 of this Agreement are not true and correct, then this Agreement is voidable at the election of the Department of Labor.

IV. The Correction is provided exemptive relief under PTE 94-71.

V. Each of the signatories below hereby represents that he or she is authorized and entitled to sign on behalf of the parties hereto.

Dated this _________________ day of ____________________,
20_______________.

For: ______________________
By: ______________________

For: The United States Department of Labor, Employee Benefits Security Administration
By: ______________________
Regional Director
Sample PTE 94-71 Notice To Affected Parties

You are hereby notified that the United States Department of Labor plans to enter into a settlement with [insert name of parties]. The settlement contemplates a proposed [insert description of transaction requiring exemptive relief under PTE 94-71]. As a participant or beneficiary of the plan, you are hereby provided the following information with respect to the proposed transaction (the Proposed Transaction).

1. In order to resolve this matter, [insert case-specific information relating to corrected transaction];

2. As a person who may be affected by the Proposed Transaction, you have the right to submit comments on the Proposed Transaction to the U.S. Department of Labor. Comments concerning the Proposed Transaction, which may be sent anonymously, should be addressed to: United States Department of Labor, Employee Benefits Security Administration, [insert Regional Office Address].

3. If the settlement agreement is finalized, the Proposed Transaction will occur on or about [insert approximate date].
(Figure 6)

Settlement Agreement No. 1

This Agreement, entered into by and between the United States Department of Labor, Employee Benefits Security Administration (EBSA) and ________________, shall fully and finally resolve and settle the issues between the parties that were raised by EBSA in its letter to ________________ dated ________________ and which are set forth as follows:

(Briefly describe issues.)

Whereas, in connection with this Agreement, ________________ has agreed to pay $X to the ________________ Plan (the plan);

Whereas, EBSA is required to assess a civil penalty of twenty percent (20%) on amounts recovered under a settlement agreement or court order ("applicable recovery amount"), pursuant to ERISA section 502(l)(2), 29 U.S.C. section 1132(l)(2);

Whereas, EBSA has determined that the applicable recovery amount within the meaning of ERISA section 502(l), 29 U.S.C. section 1132(l) is $Y;

Whereas, this Agreement is not binding on any governmental agency other than the United States Department of Labor.

Therefore, in consideration of these mutual undertakings and understandings, EBSA and ________________ agree as follows:

1. ________________ shall, within ________________ days of the signing of this Agreement, pay $X to the Plan.

2. Upon payment of $X to the Plan pursuant to this Agreement EBSA will assess a penalty of twenty percent (20%) of the applicable recovery amount, pursuant to ERISA section 502(l)(2), 29 U.S.C. section 1132(l)(2); said penalty amount to be paid will be $Y, which represents 20% of the portion of the applicable recovery amount.

3. Within ten (10) days of receipt of EBSA’s assessment letter, ________________ shall pay said penalty as directed in the letter from EBSA’s authorized representative.

4. (Other relief, if any, agreed to between the parties.)

5. Each of the signatories below hereby represents that he or she is authorized and entitled to sign on behalf of each of the parties hereto.

Dated this ________________ day of ________________, 20__.
For

By:

For: The United States Department of Labor, Employee Benefits Security Administration

By:

Regional Director
(Figure 7)

Settlement Agreement No. 2

This Agreement, entered into by and between the United States Department of Labor, Employee Benefits Security Administration (EBSA), and ____________________, with the exception of issues concerning the assessment of a civil penalty under ERISA section 502(l), 29 U.S.C. section 1132(l), shall fully and finally resolve and settle the issues between the parties that were raised by EBSA in its letter to ____________________, dated ____________________, and which are set forth as follows:

(Briefly describe issues.)

Whereas, in connection with this Agreement, ____________________ has agreed to pay $X to the ____________________ Plan (the Plan);

Whereas, EBSA maintains that it is required to assess a civil penalty of twenty percent (20%) on amounts recovered under a settlement agreement or court order ("applicable recovery amount"), pursuant to ERISA section 502(l)(2), 29 U.S.C. section 1132(l)(2);

Whereas, ____________________ reserves all rights to contest the assessment and calculation of the civil penalty under ERISA section 502(l), 29 U.S.C. section 1132(l), and to petition the Secretary of Labor for a waiver or reduction of the civil penalty;

Whereas, this Agreement is not binding on any governmental agency other than the United States Department of Labor.

Therefore, in consideration of these mutual undertakings and understandings, EBSA and ____________________ agree as follows:

1. ____________________ shall, within ____________________ days of the signing of this Agreement, pay $X to the Plan.

2. Each of the signatories below hereby represents that he or she is authorized and entitled to sign on behalf of each of the parties hereto.

Dated this ____________________ day of    , 20 ____________________.

For ____________________
By:

For: The United States Department of Labor, Employee Benefit Security Administration

By:

Regional Director
(Figure 8)

Sample Closing Letter
Corrective Action Taken

[heading]

Dear:

I have received your letter dated ________________ concerning the ________________ Plan which was in response to my letter dated ________________.  

As I pointed out in my previous letter, the Department of Labor (the Department) has responsibility for the enforcement of Title I of the Employee Retirement Income Security Act of 1974. Title I establishes standards governing the operation of employee benefit plans.

As I noted, this office has concluded its investigation of the Plan and of your activities as its trustee. Based on the facts gathered during that investigation it appeared that, as a trustee, you breached your fiduciary obligations to the Plan and violated several provisions of ERISA. The specific actions taken by you which we believe violated ERISA were detailed in my previous letter.

In your letter dated ________________, I note that you confirm the facts recited in my letter to you. It is my understanding that you have taken corrective actions with respect to the specific violations detailed in my letter of ________________. Specifically, you (detail actions taken).

Because you have taken the corrective action described above, the Department will take no further action with respect to these matters. You are cautioned, however, that by agreeing to take no further action with regard to these issues, the Department commits only itself and cannot in any way restrain any other individual or governmental agency from taking any further action it may deem appropriate with respect to either these or other matters.

Please be further advised that the resolution of this matter is limited to the specific issues reviewed in the current investigation of the Plan. The Department's findings or absence of findings, including the absence of findings regarding any specific provision of the Plan, shall not bind the Department in the review or investigation of any other employee benefit plan, any service provider, or a subsequent review of the Plan regarding issues not raised by this investigation. You must also be aware that the responsibility for the acceptance or rejection of any Annual Report (Form 5500) or any part thereof is delegated to the EBSA Office of the Chief Accountant (OCA). [The final decision concerning the adequacy of any Annual Report or any part thereof will be made by the OCA pursuant to the federal regulations set forth at 29 C.F.R. 2570.61 et seq.]
[Further, as you may be aware, Congress in enacting ERISA, added Section 4975 to the Internal Revenue Code of 1954, which imposes an excise tax on disqualified persons (generally, the same as parties in interest under Title I of ERISA) who engage in prohibited transactions with employee retirement benefit plans. In general, this excise tax, which is administered and enforced by the Internal Revenue Service, is applicable in two steps - a first level tax equal to fifteen percent of the amount involved in the transaction for each taxable year during which the transaction is outstanding and a second level tax, equal to 100 percent of the amount involved if the transaction is not corrected. The excise tax is paid concurrently with the filing of a Form 5330.

Please also be advised that pursuant to section 3003(c) of ERISA, 29 U.S.C. section 1203(c), the Secretary of Labor is required 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.]

Sincerely,
Regional Directors

Enclosures: Filing information on the Form 5330
SBREFA Notice

bcc: OPPEM (When 502(l) issues are involved)
OE/DFO
In accordance with section 3003(c) of ERISA, 29 U.S.C. §1203(c), the Department of Labor (DOL) is required to transmit to the Internal Revenue Service (IRS) information that a prohibited transaction has occurred.

If you are in agreement with DOL's determination that a prohibited transaction has occurred, please complete IRS Form 5330 in accordance with the instructions provided and mail to:

    Ogden Internal Revenue Service Center
    1160 W 1200 S
    Ogden, Utah 84201

By voluntarily filing IRS Form 5330 through this office, the IRS will be able to associate the return with DOL's notification that a prohibited transaction has occurred. This will assist the IRS in determining whether or not an IRS employee plans examination is warranted. The form and instructions can be found on the IRS’ website. Any questions on completing the IRS Form 5330 should be directed to IRS TE/GE Tax Services at 1 (877) 829-5500.
Sample Pattern Closing Letter
No ERISA Violations Detected

Dear (Plan Administrator or Fiduciary):

The Department of Labor (the Department) has recently conducted an investigation involving (name of plan) pursuant to the Employee Retirement Income Security Act of 1974. (We appreciate the cooperation you and members of your staff have extended to us.) This is to advise you that our investigation is now concluded and [with the exception of the reporting violations noted above,] no further action by the Department is contemplated at this time.

Please be further advised that the resolution of this matter is limited to the specific issues reviewed in the current investigation of the Plan. The Department's findings or absence of findings, including the absence of findings regarding any specific provision of the Plan, shall not bind the Department in the review or investigation of any other employee benefit plan, any service provider, or a subsequent review of the Plan regarding issues not raised by this investigation. You must also be aware that the responsibility for the acceptance or rejection of any Annual Report (Form 5500) or any part thereof is delegated to the EBSA Office of the Chief Accountant (OCA). [You are cautioned that this notice does not address the reporting issues described above. The final decision whether the reporting violations described above have been adequately corrected will be made by the OCA pursuant to the federal regulations set forth at 29 C.F.R. 2570.61 et seq. Accordingly, the reporting issues will be referred to the OCA for whatever action they deem appropriate.]

Sincerely,

Regional Director

Enclosure: SBREFA Notice
Sample Closing Letter
No Action Warranted
This closing letter should not be used in a 502(l) or 502(i) situation

[heading]

Dear:

The Department of Labor (the Department) has responsibility for administration and
enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).
Title I establishes standards governing the operation of employee benefit plans such as XYZ
Plan (Plan).

This office has concluded its investigation of the Plan and of your activities as its trustee.
Based on the facts gathered during this investigation, and subject to the possibility that
additional information may lead us to revise our views, it appears that, as trustee, you may
have breached your fiduciary obligations to the Plan and have violated several provisions of
ERISA. The purpose of this letter is to advise you of our findings.

As we understand the facts, many of which you provided to this office during the course of
our investigation, on December 1, 2005, the Plan loaned $500 to the XYZ Company, which is
the plan sponsor and thus a party in interest to the Plan within the meaning of ERISA section
3(14). This loan was repaid on December 15, 2005. It is our view that this loan violates
ERISA section 406(a)(1)(B), which provides:

406(a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a
transaction, if he knows or should know that such transaction constitutes
a direct or indirect-
(B) lending of money or other extension of credit between the plan and a
party in interest;

In addition our investigation has disclosed that (outline additional violations as above).

[With the exception of the reporting violations noted above,] We have concluded that further
action is not warranted at this time. You are cautioned, however, to refrain from such conduct
in the future.

Please be further advised that the resolution of this matter is limited to the specific issues
reviewed in the current investigation of the Plan. The Department's findings or absence of
findings, including the absence of findings regarding any specific provision of the Plan, shall
not bind the Department in the review or investigation of any other employee benefit plan,
any service provider, or a subsequent review of the Plan regarding issues not raised by this
investigation. You are further cautioned that this notice addresses only the issues described
You must also be aware that the responsibility for the acceptance or rejection of any Annual Report (Form 5500) or any part thereof is delegated to the EBSA Office of the Chief Accountant (OCA). [The final decision whether the reporting violations described above have been adequately corrected will be made by the OCA pursuant to the federal regulations set forth at 29 C.F.R. 2570.61 et seq. Accordingly, the reporting issues will be referred to the OCA for whatever action they deem appropriate.]

You must understand that the Department's decision is binding on the Department only and only concerns the matters discussed above. Any other individual or governmental agency remains free to take whatever action it may deem appropriate.

[Further, as you may be aware, Congress, in enacting ERISA, added Section 4975 to the Internal Revenue Code of 1954, which imposes an excise tax on disqualified persons (generally, the same as parties in interest under Title I of ERISA) who engage in prohibited transactions with employee retirement benefit plans. In general, this excise tax, which is administered and enforced by the Internal Revenue Service, is applicable in two steps - a first level tax equal to fifteen percent of the amount involved in the transaction for each taxable year during which the transaction is outstanding, and a second level tax, equal to 100 percent of the amount involved, if the transaction is not corrected. The excise tax is paid concurrently with the filing of a Form 5330 (filing information enclosed).

Please also be advised that pursuant to section 3003(c) of ERISA, 29 U.S.C. section 1203(c), the Secretary of Labor is required 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.]

We hope this letter will be helpful to you in the execution of your fiduciary duties.

Sincerely,

Regional Director

Enclosures:  Filing information on the Form 5330
               SBREFA Notice
Sample Closing Letter
No VC Letter/Referral to IRS
This closing letter should not be used in a 502(l) or 502(i) situation

[heading]

Dear:

The Department of Labor (the Department) has responsibility for administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974. Title I establishes standards governing the operation of employee benefit plans such as the XYZ Plan (the Plan).

This office has concluded its investigation of the Plan and of your activities as its trustee. Based on the facts gathered during this investigation it appears that, as trustee, you may have breached your fiduciary obligations to the Plan and have violated several provisions of ERISA. The purpose of this letter is to advise you of the nature of the violations we believe have been committed.

As we understand the facts, many of which you provided to this office during the course of our investigation, on December 1, 2005, the Plan loaned $25,000 to the XYZ Company which is the plan sponsor and a party in interest to the Plan within the meaning of ERISA section 3(14). This loan is secured by real property, bears an interest rate of 15%, and is being repaid in $500 monthly installments. It is our view that this loan violates ERISA section 406(a)(1)(B), which provides:

406(a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect-
(B) lending of money or other extension of credit between the plan and a party in interest;

[With the exception of the reporting violations noted above,] We have concluded that further action by the Department is not warranted at this time; however, you are cautioned to refrain from such conduct in the future.

Please be further advised that the resolution of this matter is limited to the specific issues reviewed in the current investigation of the Plan. The Department's findings or absence of findings, including the absence of findings regarding any specific provision of the Plan, shall not bind the Department in the review or investigation of any other employee benefit plan, any service provider, or a subsequent review of the Plan regarding issues not raised by this investigation. You are further cautioned that this notice addresses only the issues described above. You must also be aware that the responsibility for the acceptance or rejection of any
As you may be aware, Congress, in enacting ERISA, added Section 4975 to the Internal Revenue Code of 1954, which imposes an excise tax on disqualified persons (generally, the same as parties in interest under Title I of ERISA) who engage in prohibited transactions with employee retirement benefit plans. In general, this excise tax, which is administered and enforced by the Internal Revenue Service, is applicable in two steps - a first level tax equal to fifteen percent of the amount involved in the transaction for each taxable year during which the transaction is outstanding and a second level tax equal to 100 percent of the amount involved if the transaction is not corrected. The excise tax is paid concurrently with the filing of a Form 5330 (filing information enclosed).

Pursuant to Section 3003(c) of ERISA, 29 U.S.C. §1203(c), the Secretary of Labor is required to transmit to the Secretary of Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will be referred to the Internal Revenue Service.

Sincerely,

Regional Director

Enclosures:  Filing information on the Form 5330
            SBREFA Notice
Sample Closing Letter

Dear:  
I have received your letter-dated ____________________ concerning the _____________________ Plan (the Plan) that was in response to my letter dated _____________________.

As I pointed out in my previous letter, the Department of Labor (the Department) has responsibility for the enforcement of Title I of the Employee Retirement Income Security Act of 1974. Title I establishes standards governing the operation of employee benefit plans.

As I noted, this office has concluded its investigation of the Plan and of your activities as its trustee after (date). Based on the facts gathered during that investigation it appears that, as a trustee, you have violated your fiduciary obligations to the Plan and have violated several provisions of ERISA.

Specifically, on December 1, 2005, you caused the Plan to loan $25,000 to the XYZ Company, which is the plan sponsor and a party in interest within the meaning of ERISA section 3(14). This loan is secured by real property, bears an interest rate of 15%, and is being repaid in $500 monthly installments.

In my view, this loan constitutes a violation of ERISA section 406(a)(1)(B) which provides:

   406(a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect-
   (B) lending of money or other extension of credit between the plan and a party in interest;

In addition, as I noted, our investigation disclosed that (outline additional violations as above).

In your letter dated ____________________, you denied that the facts concerning the December 1, 2005 loan were true (you confirmed that the facts concerning the December 1, 2005 loan were true, but denied that those facts constitute a violation of ERISA) as stated in my previous letter.

I have considered the information provided by you (and have conducted additional investigation with regard to the new facts presented) but remain of the view that the Department's original position is correct. Therefore, we continue to believe that you have violated, and remain in violation of; the above cited fiduciary provisions of ERISA.
Despite your refusal to undertake the corrective action we deem necessary, we have decided that legal action by the Department will not be commenced at this time. You are cautioned, however, that this decision only addresses issues other than reporting violations. Please be further advised that the resolution of this matter is limited to the specific issues reviewed in the current investigation of the Plan. The Department's findings or absence of findings, including the absence of findings regarding any specific provision of the Plan, shall not bind the Department in the review or investigation of any other employee benefit plan, any service provider, or a subsequent review of the Plan regarding issues not raised by this investigation. You must also be aware that the responsibility for the acceptance or rejection of any Annual Report (Form 5500) or any part thereof is delegated to the EBSA Office of the Chief Accountant (OCA). [The final decision concerning reporting issues will be made by the OCA pursuant to the federal regulations set forth at 29 C.F.R. 2570.61 et seq. Accordingly, the reporting issues described above will be referred to the OCA for whatever action they deem appropriate.]

Suit by other parties including plan fiduciaries, participants, or their beneficiaries remains possible. Additionally, pursuant to section 504(a) of ERISA, I am authorized to provide relevant information concerning the findings and supporting documentation of our investigation to any interested party. I am also authorized to provide such information to other government agencies in a position to undertake corrective action. Please understand that I will provide such information, as I deem appropriate. Finally, our decision not to bring any legal action at this time may be reviewed in the future and the possibility of future legal action remains.

[Further, as you may be aware, Congress, in enacting ERISA, added Section 4975 to the Internal Revenue Code of 1954, which imposes an excise tax on disqualified persons (generally, the same as parties in interest under Title I of ERISA) who engage in prohibited transactions with employee retirement benefit plans. In general, this excise tax, which is administered and enforced by the Internal Revenue Service, is applicable in two steps - a first level tax equal to fifteen percent of the amount involved in the transaction for each taxable year during which the transaction is outstanding and a second level tax, equal to 100 percent of the amount involved if the transaction is not corrected. The excise tax is paid concurrently with the filing of a Form 5330 (filing information enclosed).

Please also be advised that pursuant to section 3003(c) of ERISA, 29 U.S.C. section 1203(c), the Secretary of Labor is required 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.]

Sincerely,

Regional Director

Enclosures: Filing information on the Form 5330
SBREFA Notice
## APPENDIX B

### Examination Referral Checksheet A
*(To be completed by DOL Investigators for referral of plans subject to Title II of ERISA to the IRS)*

<table>
<thead>
<tr>
<th>Employer/Sponsor Name and Address</th>
<th>Plan EIN/PN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plan Name</td>
<td>Plan Year Examined</td>
</tr>
<tr>
<td>Address of Plan Books and Records</td>
<td>DOL Case Number</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Plan Explanation</th>
<th>(Circle one response.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Have all required Form 5500 series returns, including appropriate schedules been filed timely?</td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>2(a). Has a favorable determination letter <em>(or opinion letter in the case of a master or prototype plan)</em> been issued after December 31, 2000?</td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>2(b). Has a substantive amendment <em>(not including IRS Model Amendments)</em> been made to the plan since the date of the most recent determination letter <em>(or opinion letter, if applicable)</em>?</td>
<td>N/A No Yes</td>
</tr>
<tr>
<td>3(a). If the plan is being or has been terminated, has the employer filed Form 5310 requesting a determination letter on the qualification of the plan upon termination?</td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>3(b). If there was a reversion, was a Form 5330 timely filed to report the reversion? Enter the amount of the reversion.</td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>4. Was there a merger, spin-off or a transfer from a defined benefit plan to a defined contribution plan?</td>
<td>N/A No Yes</td>
</tr>
<tr>
<td>5(a). Is there any indication that the plan has been operated in a manner that resulted in discrimination in favor of the highly compensated employees?</td>
<td>N/A No Yes</td>
</tr>
<tr>
<td>5(b). Is there a pattern of employer-initiated termination of nonhighly compensated employees before they are vested in their accrued benefits?</td>
<td>N/A No Yes</td>
</tr>
<tr>
<td>6. Are there any indications that the minimum funding requirements of IRC 412 are not satisfied?</td>
<td>N/A No Yes</td>
</tr>
<tr>
<td>7. Is there any indications that a prohibited transaction subject to the tax in IRC 4975(a) has occurred between the plan and a disqualified person? <em>(Answer &quot;yes&quot; only if the transaction is not covered by a statutory exemption under IRC 4975(d) or if the terms of an administrative exemptions have not been complied with.)</em></td>
<td>N/A No Yes</td>
</tr>
<tr>
<td>8(a). If contributions are in the form of assets other than cash: <em>(a) Does the plan document provide for contributions in kind?</em></td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>8(b). Are such contributions valued at fair market value?</td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>9. Are all trust assets valued annually at fair market value?</td>
<td>N/A Yes No</td>
</tr>
<tr>
<td>10. Is there any other issue that would require referral? <em>(Explain in Remarks below.)</em></td>
<td>N/A No Yes</td>
</tr>
</tbody>
</table>

**Remarks**

**Date Mailed to IRS**

**Date Mailed to Regional Director/District Supervisor**

**Auditor/Investigator (DOL)**

**Regional Office**

**Phone No.**

**Signature of Regional Director**

**Action Taken by IRS**

- [ ] No action planned
- [ ] IRS Examination Planned
- [ ] Additional Information Requested

**Name of Reviewer:**

**Phone No.:**

---

Form **6212-A** *(Rev. 8-2003)*

Catalog Number 60146B

Department of the Treasury-Internal Revenue Service publish.irs.gov
Instructions for Completing Checksheets A

General Instructions for Checksheets A

1. All questions on this checksheet must be answered. Answers which fall into the rightmost column will require referral of this plan to IRS with the exception of questions 2(a), 2(b) and 3(a), where referral is discretionary. Only plans subject to Title II of ERISA (e.g., qualified plans described in IRS 401(a) should be referred to the IRS.

2. "Action Taken by IRS" block should be completed as required in Part II.D.3. of the IRS/DOL coordination agreement.

3. Referral checksheets are to be signed by the Regional Director.

Specific Instructions

1) See filing instructions for Form 5500 for a summary of filing requirements for Employers and Plan Administrators. Those instructions also outline filing requirements for schedules A, B and SSA required with Form 5500.

2) A previously approved master or prototype plan will be evidenced by an opinion letter containing an eight character serial number provided by the IRS. A substantive plan amendment is one that could, by itself, affect plan qualification. For this purpose, a substantive amendment to the plan would not include the adoption of model amendments published by IRS [e.g., model amendments provided for direct rollovers under IRC 401(a)(31), and model amendments relating to the compensation limitation under IRC 401(a)(17)]. If the substantive amendment has not been the subject of a favorable determination letter, include a copy of the amendment with the referral.

3) Terminations are indicated by plan amendments to that effect, by indication on Form 5500 series returns, and by ceasing plan contributions. The plan sponsor or administrator should be interviewed concerning determination letters requested on a termination. In the instance of a reversion, the Form 5330 must be filed by the last day of the month following the month in which the reversion occurred.

4) Inquire of Plan officials concerning plan mergers, spin offs, or transfers of assets from a qualified defined benefit plan to a qualified defined contribution plan. IRC 4067(b)(4) requires notification. The Form 5310-A must be filed at least 30 days before the plan merger, consolidation, or transfer of plan assets or liabilities.

5) A referral should be made only if the transaction was between the plan and a disqualified person as defined in IRC 4975(e)(2). The question should be answered "yes" and referred even if voluntary compliance has been achieved by DOL. If the prohibited transaction amount is under $20,000, only a copy of the Closing or VC letter describing the transaction and a copy of the ROI (without attachments) needs to be attached to the Form 6212-A. If the prohibited transaction amount is $20,000 or greater, the following items must accompany the referral:

a) Copy of Form 5500 series return for all years in which a prohibited transaction was in effect.

b) Available information about taxpayer/disqualified person including EIN/SSN, address, educational level, and possible name changes.

c) Copy of plan and trust documents if either Question 2(a) or 2(b) is answered "No".

d) Copy of all DOL correspondence related to the referred issue.

e) Copy of the Report of Investigation and related work papers.

f) Description of current status of prohibited transaction, including possible corrective action.

g) DOL closing letter or voluntary compliance letter is applicable, prepared in accordance with section D.5(g) of Part II of the coordination agreement.

i) Disqualified person's position regarding the prohibited transaction if known.

j) Information in DOL's possession concerning the disqualified person's filing or intent to file for bankruptcy.

j) Any other information that documents the reason for the referral.

6) Indicate in the remarks section the reasons that contributions are believed to be made at less than FMV.

Instructions for IRS Personnel

1. "Action Taken by IRS" block should be completed as required in Part II.D.3. of the IRS/DOL Coordination Agreement.

2. If item 3(b) is answered "No", or items 6 or 7 are answered "Yes", IRS personnel must indicate in "Remarks" the amount of excise tax assessed under IRC 4971(a) and/or (b), 4975 or 4980; or, the reason for not assessing excise tax.

3. Complete "Date Mailed to Regional Director".
# APPENDIX C

## Examination Referral Checksheet B

*(To be completed by the EP Examiner's for referral to DOL)*

<table>
<thead>
<tr>
<th>Employer/Sponsor Name Address</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Plan Name</td>
<td></td>
</tr>
<tr>
<td>Address of Plan Books and Records</td>
<td></td>
</tr>
</tbody>
</table>

### Plan Explanation Items

<table>
<thead>
<tr>
<th></th>
<th>(Circle one.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Do the investments of the trust appear to be prudent and permitted by the plan document, and is the performance of the investment portfolio monitored? <em>(ERISA sec 404)</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>2. Does the plan appear to have diversified its investments by not holding more than 20% of its portfolio in any SINGLE investments, except as permitted by the plan document? <em>(ERISA sec 404(a)(1)(C))</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>3. With respect to any person rendering services to the plan, and receiving directly or indirectly more than $5,000 in compensation from the plan (excluding employees of the plan earning less than $1,000 each month), does the compensation appear reasonable for services rendered? <em>(ERISA sec 404(a)(1)(A))</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>4. Have individuals receiving expense reimbursement from the plan supplied sufficient documentation to warrant the reimbursement? <em>(ERISA sec 408(c)(2))</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>5. Has a written appraisal been made by an unrelated third party within three months prior to any contribution, sale, or purchase of real estate or non-publicly traded securities? <em>(ERISA sec 103 &amp; 408(e))</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>6. Are trust assets and individual account balances reported and allocated at current value? <em>(ERISA sec 103(b)(3)(A))</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>7. Were any loans or leases by the plan, or fixed income obligations due the plan, in default as of the close of the plan year or classified during the year as uncollectible? <em>(ERISA sec 103(b)(3), 404, &amp; 406)</em></td>
<td>NA No Yes</td>
</tr>
<tr>
<td>8. Have any individuals engaged in a non-exempt prohibited transaction, which was not corrected? <em>(ERISA sec 406)</em></td>
<td>NA No Yes</td>
</tr>
<tr>
<td>9. Does the plan fail to meet minimum funding standards as a result of a fiduciary breach? <em>(ERISA sec 302)</em></td>
<td>NA No Yes</td>
</tr>
<tr>
<td>10. Have all the required reports <em>(and accountant's opinion, where required)</em> been filed or distributed in a timely manner? <em>(if Yes, just circle Yes. If No, circle No and check type of report below):</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>5500</td>
<td>SMM</td>
</tr>
<tr>
<td>SPD</td>
<td>SAR</td>
</tr>
<tr>
<td>11. Are all plan personnel who are handling plan funds covered by a fidelity bond? <em>(ERISA sec 412)</em></td>
<td>NA Yes No</td>
</tr>
<tr>
<td>12. Other Referrals - see remarks below</td>
<td>NA Yes No</td>
</tr>
</tbody>
</table>

### Remarks

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## IRS Referral Information

<table>
<thead>
<tr>
<th>IRS Examining Specialist</th>
<th>IRS Office</th>
<th>Phone No.</th>
<th>Action Taken by DOL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>□ No action planned</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>□ DOL investigation planned</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name of DOL Reviewer</th>
<th>Regional Office</th>
<th>Phone No.</th>
<th>Additional Information Requested <em>(Specify on separate sheet of paper.)</em></th>
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</tbody>
</table>

☐ DOL Participation Requested

Signature *(EP Area Manager)*

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Form 6212-B *(Rev. 8-2003)*

Catalog Number 615191

Department of the Treasury-Internal Revenue Service

 Publish no. irs.gov
Instructions for Completing Checksheet B

1. Plan fiduciaries should be asked to explain current monitoring procedures for plan investments (e.g., are investments consistent with investment guidelines and limitations contained in the plan document.) The investment practices of the fiduciaries as well as the return on plan investments should be examined.

2. ERISA section 404 contains the diversification requirements. Please describe the possible lack of diversification in the remarks section.

3. Look to the Form 5500 questions and attached schedules regarding payments to persons rendering services to the plan.

4. ERISA section 406(c)(2) allows plan fiduciaries reimbursement for expenses properly and actually incurred in carrying out plan business.

5. ERISA section 103 requires plan assets to be reported at their current value. ERISA section 408(e) permits the acquisition or sale of qualifying employer securities and real property between the plan and a party in interest, if the transaction is for adequate consideration, no commissions are paid and the requirements of section 407(a) are otherwise satisfied (i.e., percentage limitations).

6. ERISA section 103(b)(3)(A) requires a plan to report its assets and liabilities at current value.

7. Look to the Form 5500 and the accountant's report (especially the notes to the financial statements) for helpful information.

8. ERISA section 406 specifically prohibits certain transactions between a plan and a party in interest. ERISA section 406 provides certain statutory exemptions for transactions, which would otherwise be prohibited. The prohibitions and exemptions are virtually identical to those contained in IRC 4975. Please list the nature of the violations in the remarks section.

9. Describe the fiduciary breach that resulted in the funding deficiency in the remarks section.

10. The reporting and disclosure requirement apply to both pension and welfare plans.

The Summary Plan Description (SPD) is to be distributed to participants and beneficiaries within 120 days after the plan becomes subject to ERISA.

The Summary Annual Report (SAR) is to be distributed to participants and beneficiaries 9 months (plus extensions) after the plan fiscal year end.

The Summary of Material Modifications (SMM) represents changes to data contained in the SPD and is to be distributed to participants and beneficiaries 210 days after the plan fiscal year end for years in which changes occur.

11. ERISA Section 412 contains the bonding requirements for fiduciaries and other persons who handle funds or property of a plan.

12. List the reasons for referral in the remarks section.

IRS Instructions

1. All questions on this checksheet must be answered. Answers, which fall in the rightmost column, require referral to the DOL.

2. The "DOL Participation Requested" block must be checked in unagreed examinations involving the excise taxes under Section 4971 or 4975.

3. Checksheet B is to be mailed to the appropriate Regional Director.

DOL Instructions

1. Complete "Date returned to IRS".