



## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2550

[Application No. D-11799]

RIN 1210-ZA23

### Prohibited Transaction Exemption (PTE) 2002-51 to Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Proposed amendment to prohibited transaction exemption.

**SUMMARY:** This document gives notice of a proposed amendment to Prohibited Transaction Exemption 2002-51, an exemption for certain transactions identified in the Department's Voluntary Fiduciary Correction Program (VFC Program or VFCP). The VFC Program allows persons who may have engaged in a breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) to correct the breach and avoid certain Department of Labor-initiated civil actions and assessment of civil penalties. PTE 2002-51 (the VFCP Class Exemption) is a related class exemption that provides an exemption from excise taxes imposed by the Internal Revenue Code of 1986, as amended, for certain eligible transactions corrected pursuant to the VFC Program. This amendment to the VFCP Class Exemption is being proposed in connection with the Department's amendment and restatement of the VFC Program, published elsewhere in today's issue of the *Federal Register* (2022 Program Notice). If granted, the amendment to the VFCP Class Exemption would affect plans, participants and beneficiaries of such plans, and certain other persons engaging in such transactions.

**DATES:** Written comments on the proposed amendment must be received by the Department by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** All written comments and requests for a hearing concerning the proposed amendment to the class exemption should be sent to the Office of Exemption Determinations through the Federal eRulemaking Portal and identified by Application No. D-11799:

*Federal eRulemaking Portal:* <http://www.regulations.gov> at Docket ID number: EBSA-2022-0024. Follow the instructions for submitting comments.

See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

**FOR FURTHER INFORMATION CONTACT:** Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone number (202) 693-8540 (this is not a toll-free number).

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

**SUPPLEMENTARY INFORMATION:**

***Comment Instructions***

All comments and requests for a hearing must be received by the end of the comment period. Requests for a hearing must state the issues to be addressed and include a general description of the evidence to be presented at the hearing. Persons are encouraged to submit all comments electronically and not to submit paper copies. The comments and hearing requests may be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210. Comments and hearing requests will also be available online at <http://www.regulations.gov>, at Docket ID number: EBSA-2022-0024 and <http://www.dol.gov/ebsa>, at no charge.

*Warning:* All comments received will be included in the public record without change and will be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the <http://www.regulations.gov> website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it.

#### *Executive Orders 12866 and 13563*

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

Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out

of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is “significant” within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposed amendment, and OMB has reviewed this regulatory action.<sup>1</sup>

#### *Paperwork Reduction Act*

The amendments to the VFC Program include a revision to its information collection provisions. Accordingly, the revisions have been submitted to OMB for review and approval under the Paperwork Reduction Act (PRA). Because this proposed amendment to the VFCP Class Exemption would be used when finalized in connection with the VFC Program, and for ease of public review, the burden of the Information Collection Request (ICR) in the VFC Program is combined with the burden of the information collection provisions of the exemption for purposes of accounting for burden under the PRA. These burden calculations can be viewed in the PRA analysis included in the 2022 Program Notice, Amendment and Restatement of Voluntary Fiduciary Correction Program, published elsewhere in today’s Federal Register.

Persons are not required to respond to the information collection unless it displays a currently valid OMB control number 1210-0118, which is scheduled to expire on May 31, 2025. Currently, EBSA is soliciting comments concerning the proposed changes to this ICR. A copy of the ICR may be obtained by contacting the PRA addressee shown in the 2022 Program Notice.

#### *Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (RFA)<sup>2</sup> imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act, or any other law, and are likely to have a significant economic impact on a substantial number of small entities.<sup>3</sup> Unless the head of an agency certifies that a

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<sup>1</sup> See 2022 Program Notice, Section D, “Regulatory Impact Analysis.”

<sup>2</sup> 5 U.S.C. § 601 et seq. (1980).

<sup>3</sup> 5 U.S.C. § 551 et seq. (1946).

proposed rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis of the proposed rule.<sup>4</sup>

The Department certifies that these proposed amendments to PTE 2002-51 will not have a significant economic impact on a substantial number of small entities. See 2022 Program Notice for the factual basis for the certification.

## **Background**

### *History of the VFC Program and VFCP Class Exemption*

The Department of Labor's Employee Benefits Security Administration (EBSA) originally adopted the VFC Program in 2002, and later revised it in 2005 and 2006.<sup>5</sup> EBSA designed the VFC Program to encourage employers and plan fiduciaries to voluntarily comply with the Employee Retirement Income Security Act (ERISA) and allow those potentially liable for certain specified fiduciary breaches under ERISA to voluntarily apply for relief from enforcement actions and certain penalties, provided they meet the VFC Program's criteria and follow the procedures outlined in the VFC Program. Many workers have benefited from the VFC Program due to the restoration of plan assets and the payment of promised benefits.

The VFC Program describes how to apply for relief and lists the specific transactions covered and acceptable methods for correcting fiduciary breaches under the Program. The most frequently corrected transaction under the Program is the correction of delinquent participant contributions. The Program provides a model application form, a checklist, and an online calculator for determining amounts to be restored to plans. Eligible applicants that satisfy the terms and conditions of the existing VFC Program receive a no-action letter from EBSA and

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<sup>4</sup> 5 U.S.C. 604 (1980).

<sup>5</sup> 67 FR 15062 (March 28, 2002); 70 FR. 17516 (April 6, 2005); 71 FR. 20262 (April 19, 2006).

avoid the assessment of civil monetary penalties. The VFC Program has been, and will continue to be, administered in EBSA's Regional Offices.

The Department granted the VFCEP Class Exemption in connection with the VFC Program. Some of the breaches that may be corrected under the VFC Program are also prohibited transactions subject to excise tax under Internal Revenue Code (Code) section 4975.

Reorganization Plan No. 4 of 1978 transferred the authority of the Secretary of Treasury to issue exemptions from the prohibited transaction provisions of Code section 4975 to the Secretary of Labor.<sup>6</sup> Therefore, the exemption provides excise tax relief to parties that correct certain specified breaches under the VFC Program.

The VFCEP Class Exemption currently covers the following transactions:

- The failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulation, and/or failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer.<sup>7</sup>
- The making of a loan at a fair market interest rate to a disqualified person.
- The purchase or sale of an asset (including real property) between a plan and a disqualified person at fair market value.
- The sale of real property to a plan by the employer and the leaseback of the property to the employer, at fair market value and fair market rental value, respectively.
- The purchase of an asset (including real property) by a plan where the asset has later been determined to be illiquid, or in which the asset was acquired from an unrelated third party, and/or the subsequent sale of such asset in a prohibited transaction pursuant to Code section 4975(c)(1).
- The use of plan assets to pay expenses, including commissions or fees, to a service provider for services provided in connection with the establishment, design or termination of the plan, provided that the payment of these settlor expenses was not expressly prohibited by the plan.

The VFCEP Class Exemption is subject to several general conditions. First, the breach must be appropriately corrected and the party applying must satisfy all the conditions of the VFC Program and receive a no-action letter from EBSA. Further, the applicant may not have taken

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<sup>6</sup> 5 U.S.C. App. 252 (2020).

<sup>7</sup> See 29 CFR section 2510.3-102.

advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction(s) during three years before the current VFCEP application.<sup>8</sup> The applicant must provide notice to interested persons of the transaction for which relief is sought within 60 days of the VFC Program submission. However, notice is not required if the excise tax that would otherwise be imposed under the Code is less than or equal to \$100 and that amount is paid to the plan and allocated to participants and beneficiaries.

In addition to these general conditions, the exemption includes certain transaction-specific conditions. For example, as relevant to this proposal, participant contributions and loan repayments that are not timely transmitted (referred to collectively as delinquent participant contributions) must be transmitted to the pension plan no more than 180 calendar days from the date they either were received by the employer or otherwise would have been payable to the participant in cash.

#### *2022 Amendments to VFC Program*

The 2022 Program Notice contains an amended and restated VFC Program including the establishment of a self-correction feature for certain delinquent participant contributions and loan repayments to pension plans (the SC Component). The VFC Program is used most frequently to correct delinquent participant contributions; therefore, the Department has concluded that an appropriately designed self-correction feature will: (1) positively respond to public feedback concerning the time and expense currently required to file VFC Program applications for transactions that involve small dollar amounts; (2) offer plan officials and other responsible fiduciaries a streamlined correction process thereby encouraging more voluntary corrections; and (3) enable EBSA to better allocate resources currently dedicated to processing VFC Program applications for these transactions.

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<sup>8</sup> There is an exception to the three-year rule for certain service providers that are broker-dealers, banks, insurance companies and their affiliates and that did not use their discretion to cause the prohibited transaction and did not have actual knowledge or reason to know that the underlying transaction was a non-exempt prohibited transaction.

If granted, this amendment to the VFCP Class Exemption would provide excise tax relief for transactions that are corrected pursuant to the SC Component. The proposed amendment also would clarify existing transactions eligible for correction under the Program, expand the scope of other transactions currently eligible for correction, and simplify certain administrative or procedural requirements for participation in, and correction of, transactions under the VFC Program. Code section 4975, which governs the Department's authority to issue exemptions from the prohibited transaction provisions in the Code, requires the Department to provide notice to interested persons and opportunity for public comment before issuing an exemption or amendment thereto.<sup>9</sup> Thus the amendments to the VFCP Class Exemption proposed in this notice will not be effective until the Department grants a final amendment to the exemption.

### **Description of the Proposed Amendments to the VFCP Class Exemption**

#### *Self-Correction Feature for Delinquent Participant Contributions and Loan Repayments to Pension Plans*

The 2022 Program Notice establishes the SC Component for certain delinquent contributions to pension plans. The SC Component allows “self-correctors” to make a plan whole and receive relief under the VFC Program without submitting an application to EBSA and receiving a no-action letter. Instead, self-correctors provide a notice (the SCC notice) to EBSA through an electronic tool on EBSA's website and receive an e-mail acknowledgement from EBSA of a properly completed and submitted SCC notice. Relief under the SC Component for delinquent participant contributions is limited to corrections where the amount of lost earnings is \$1,000.00 or less.<sup>10</sup> In the 2022 Program Notice, the Department solicits comments on specific aspects of the SC Component. To the extent commenters suggest changes to the SC Component, the Department requests comments on whether corresponding changes to the exemption are necessary.

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<sup>9</sup> As noted above, under Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 252 (2020), the authority of the Secretary of Treasury to issue exemptions pursuant to Code section 4975 was transferred to the Secretary of Labor.

<sup>10</sup> The \$1,000 limit is calculated without regard to any amount that is contributed to the plan under the exception to the notice provision.



The Department is proposing to amend Section I.A. of the exemption to clarify that excise tax relief is available for transactions that are corrected under the SC Component. These transactions would be required to comply with the applicable exemption conditions, including the requirement that delinquent contributions may not have been transmitted to the plan more than 180 calendar days from the date they were either received by the employer or otherwise would have been payable to the participant in cash.

The proposal also includes an amendment to Section III.B of the exemption, which provides that the exemption will apply only if the applicant receives an EBSA no-action letter pursuant to the VFC Program. Since self-correctors will receive an e-mail acknowledgement instead of a no-action letter from EBSA, this condition would be amended to add a specific reference to the e-mail acknowledgement of a properly completed and submitted SCC notice.

#### *Frequency of Use*

The exemption is generally unavailable to VFC Program applicants that have, within the previous three years, taken advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction. The exemption provides a narrow exception from the three-year limitation for certain service providers (broker-dealers, banks, insurance companies and their affiliates) who may have reasonably relied on a plan fiduciary's mistaken belief that an administrative or statutory exemption was available.

The Department is proposing to eliminate the three-year limitation. The three-year provision was initially included in the exemption to prevent parties from becoming lax in complying with fiduciary and other ERISA duties because of the availability of the exemption. Based on the Department's experience with the VFC Program and the exemption, the Department concluded that the risk of such behavior is low. Notwithstanding the three-year limit on use of the exemption., applicants may correct covered transactions under the VFC Program itself multiple times within three years, but the Department has not seen indications that they are

doing so in significant numbers. More importantly, the application filing process and reporting requirements under the VFC Program and the SC Component provide the Department with notice of repeat usage. This, together with the “under investigation” ineligibility condition, provides the Department with tools to protect participants and beneficiaries from inappropriate use of the exemption. Thus, in the Department’s view, the VFC Program (including the SC Component) and the other conditions of this exemption should provide sufficient safeguards to ensure that the exemption is in the interests of plans, their participants and beneficiaries and protective of the rights of participants and beneficiaries as required by Code section 4975(c)(2).

The Department requests comments regarding whether removal of the three-year limitation would encourage greater use of the VFC Program without loss of meaningful protections for participants and beneficiaries or whether the three-year provision or some other frequency limitation should be retained for some or all covered transactions because it provides protection for participants and beneficiaries that cannot be achieved by the application, reporting, and of other conditions in the exemption and VFC Program.

#### *Sale and Leaseback of Real Property to an Employer*

Section I.D. of the VFCP Class Exemption applies to the sale of real property to a plan by the sponsoring employer and the leaseback of such property to the same employer if it is corrected as required under the VFC Program. The amendment would expand the covered transactions in Section I.D. to include affiliates of plan sponsors, which reflects a change made in the 2022 Program Notice. Accordingly, the amended exemption would be available for a sale of real property by an affiliate of the employer sponsoring the plan, to the plan, and a leaseback of such property to the affiliate of the sponsoring employer.

In the proposed amendment, the term “affiliate” of a person would be defined as follows—

- (1) any person directly, or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;
- (2) any officer, director, partner,

employee, or member of the family (as defined in Code section 4975(e)(6)) of the person; or (3) any corporation or partnership of which such person is an officer, director, partner or employee.

The proposal also would define the term “control” as the power to exercise a controlling influence over the management of a person other than an individual.<sup>11</sup>

#### *Proposed Deletion of Section II.E.*

The proposed amendment would delete Section II.E. of the exemption. The condition relates to all the covered transactions under Section I and requires that “the transaction was not part of an agreement, arrangement or understanding designed to benefit a disqualified person.” The Department believes that this condition is unnecessary in light of the other, more specific conditions of the exemption, and the fact that the transaction must have been corrected in accordance with the applicable requirements of the VFC Program for the exemption to apply.

#### *Notice to Interested Persons*

The proposed amendment to the VFCP Class Exemption would make several changes to Section IV of the exemption, which governs notice to interested persons. Under existing Section IV, VFC Program applicants seeking relief under the exemption must provide written notice to interested persons of the transactions for which relief is sought pursuant to the VFC Program and the exemption. A copy of the notice must be provided to the appropriate EBSA Regional Office.

There is an existing exception to the notice requirement for delinquent participant contributions and/or loan repayments described in Section I.A. of the exemption if the amount of the excise tax that would otherwise be paid under Code section 4975 is less than or equal to \$100. Under the exception in Section IV.C., applicants may pay to the plan an amount equal to the excise tax otherwise due, instead of providing the written notice to interested persons. VFC Program applicants using the exception must provide a copy of a completed IRS Form 5330 or

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<sup>11</sup> Both terms are defined in a proposed new Section V.

written documentation containing the information required by IRS Form 5330 and proof of payment with the submission of their VFC Program applications to the appropriate EBSA Regional Office.

The proposed amendment would provide a special rule for self-correctors with respect to providing notice to interested persons. In light of the streamlined procedure for self-correction and the small amounts of excise taxes that would be imposed on transactions corrected under the SC Component, the Department is proposing in Section IV.D. to make the exception to the notice provision mandatory for self-correctors. For purposes of this proposed condition, the amount of the excise tax that would otherwise be imposed by Code section 4975 would be paid to the plan and allocated to the individual accounts of participants and beneficiaries in the same manner as provided under the plan with respect to plan earnings. The Department also is proposing that self-correctors using the exemption would not be subject to the requirement to provide a copy of the completed IRS Form 5330 along with proof of payment to the appropriate EBSA Regional Office. Instead, such self-correctors would be required to retain a completed Form 5330 or other written documentation of the determination of the otherwise applicable excise taxes and proof of payment of the amounts paid to the plan and provide a copy of such documentation to be kept by the plan administrator.

The Department has not proposed any dollar limitation for amounts contributed to the plan pursuant to Section IV.D., because the amounts should be small due to the 2022 Program Notice's \$1,000 limitation on lost earnings. However, the Department requests comment on whether there should be a dollar limit associated with this condition in case the \$1,000 dollar threshold to participate in the SC Component is later raised or eliminated. In that event, should self-correctors be required to follow the general rule set forth in Section IV.C., under which notice must be provided to interested persons unless the amount of the excise tax that would otherwise be paid is less than or equal to \$100?

Section IV.B. of the exemption, relating to the manner of providing the notice to interested persons, also would be amended to prohibit that notice from being provided through posting alone. The Department no longer believes that posting the notification is reasonably calculated to ensure that interested persons actually receive the notice.

The Department has reviewed several notices to interested persons submitted to the applicable Regional Offices and found that some of them do not meet the applicable requirements of Section IV. To facilitate compliance with Section IV, the Department has prepared a model notice to interested persons as an appendix to this proposal. Because the purpose of the model notice is to provide compliance assistance, VFC Program applicants are not required to use the model notice.

*Other proposed amendments.*

The Department is also proposing certain ministerial changes to PTE 2002-51 to improve readability. For example, the Department is proposing to replace references “to sections of the Code” to instead refer to “Code section.”

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under Code section 4975(c)(2) does not relieve a fiduciary or other disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply, the requirement that all assets of an employee benefit plan be held in trust by one or more trustees, and the general fiduciary responsibility provisions of ERISA which require, among other things, that a fiduciary discharge their duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the requirement of Code section 401(a) that the plan must operate for

the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) The proposed amendment to PTE 2002-51, if granted, would not extend to transactions prohibited under Code section 4975(c)(1)(F).

(3) Before the proposed amendment is granted under Code section 4975(c)(2), the Department must find that the amendment is administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plans.

(4) The proposed amendment to the exemption, if granted, would be supplemental to, and not in derogation of other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(5) If granted, the amendment to the exemption would be applicable to a transaction only if the conditions specified in the class exemption are satisfied.

### **Proposed Amendment to PTE 2002-51**

Under Code section 4975(c)(2) and in accordance with the procedures set forth in 29 CFR 2570, subpart B (76 FR 66637, October 27, 2011), the Department proposes to amend and restate PTE 2002-51 as set forth below.

#### *Section I. Eligible Transactions*

The sanctions resulting from the application of Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to the following eligible transactions described in Section 7 of the Voluntary Fiduciary Correction (VFC) Program, as amended, provided that the applicable conditions set forth in Sections II, III, and IV are met:

A. Failure to forward participant contributions and/or loan repayments to a pension plan for investment within the time frames determined with reference to the principles of the

Department's regulation at 29 CFR 2510.3-102 so that the employer retains such contributions or loan repayments for a longer period of time. (See VFC Program, Section 7.1(a) and Section 7.1(b) (relating to the Self-Correction (SC) Component of the VFC Program).)

B. Loan at a fair market interest rate to a disqualified person with respect to a plan. (See VFC Program, Section 7.2(a).)

C. Purchase or sale of an asset (including real property) between a plan and a disqualified person at fair market value. (See VFC Program, Sections 7.4(a) and 7.4(b).)

D. Sale of real property to a plan by the employer or an affiliate of such an employer and the leaseback of the property to the employer or the affiliate, at fair market value and fair market rental value, respectively. (See VFC Program, Section 7.4(c).)

E. Purchase of an asset (including real property) by a plan, where the asset has later been determined to be illiquid as described under the VFC Program in a transaction which was a prohibited transaction pursuant to Code section 4975(c)(1), or in which the asset was acquired from an unrelated third party, and/or the subsequent sale of such asset in a transaction prohibited pursuant to Code section 4975(c)(1). (See VFC Program, Section 7.4(f).)

F. Use of plan assets to pay expenses, including commissions or fees, to a service provider (*e.g.*, attorney, accountant, recordkeeper, actuary, financial advisor, or insurance agent) for services provided in connection with the establishment, design or termination of the plan (settlor expenses), which relate to the activities of the plan sponsor in its capacity as settlor, provided that the payment of the settlor expense was not expressly prohibited by a plan provision relating to the payment of expenses by the plan. (See VFC Program, Section 7.6(b).)

## *Section II. Conditions*

A. With respect to a transaction involving participant contributions or loan repayments to pension plans described in Section I.A., the contributions or repayments were transmitted to the pension plan not more than 180 calendar days from the date the amounts were received by the

employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date the amounts otherwise would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

B. With respect to the transactions described in Sections I.B., I.C., I.D., or I.E., the plan assets involved in the transaction, or series of related transactions, did not, in the aggregate, exceed 10 percent of the fair market value of all the assets of the plan at the time of the transaction.

C. The fair market value of any plan asset involved in a transaction described in Sections I.C., I.D., or I.E., was determined in accordance with Section 5 of the VFC Program.

D. The terms of a transaction described in Sections I.B., I.C., I.D., I.E., or I.F., were at least as favorable to the plan as the terms generally available in arm's-length transactions between unrelated parties.

E. With respect to a transaction involving a sale of an illiquid asset under the VFC Program described in Section I.E., the plan paid no brokerage fees, or commissions in connection with the sale of the asset.

F. With respect to any transaction described in Section I.F., the amount of plan assets involved in the transaction or series of related transactions did not, in the aggregate, exceed the lesser of \$10,000 or five (5) percent of the fair market value of all the assets of the plan at the time of the transaction.

### *Section III. Compliance with the VFC Program*

A. The applicant or self-corrector, as applicable, has met all applicable requirements of the VFC Program.

B. EBSA has issued a no-action letter to the applicant pursuant to the VFC Program with respect to a transaction described in Section I, other than for transactions corrected pursuant to the SC Component of the VFC Program. For transactions corrected pursuant to the SC



Component of the VFC Program, the terms of this section will be satisfied if EBSA has acknowledged receipt of the SCC notice in accordance with Section 6.2 of the VFC Program.

*Section IV. Notice to Interested Persons and Special Rules for Self-Correctors*

A. Written notice of the transaction(s) for which the applicant is seeking relief pursuant to the VFC Program, and this exemption, and the method of correcting the transaction, was provided to interested persons within 60 calendar days following the date of the submission of an application under the VFC Program. A copy of the notice was provided to the appropriate Regional Office of the United States Department of Labor, Employee Benefits Security Administration, within the same 60-day period, and the applicant indicated the date upon which notice was distributed to interested persons. Plan assets were not used to pay for the notice. The notice included an objective description of the transaction and the steps taken to correct it, written in a manner reasonably calculated to be understood by the average Plan participant or beneficiary. The notice provided for a period of 30 calendar days, beginning on the date the notice was distributed, for interested persons to provide comments to the appropriate Regional Office, and it included the address and telephone number of such Regional Office. The Model Notice to Interested Persons contained in the Appendix may be used to satisfy the written notice requirement contained in this Section IV.

B. The notice to interested persons described in Section IV.A. was given in a manner that was reasonably calculated, taking into consideration the circumstances of the plan, to result in the receipt of such notice by interested persons, including but not limited to regular mail, or electronic mail, or any combination thereof. The notice informed interested persons of the applicant's participation in the VFC Program and intention of availing itself of relief under the exemption.

C. Notwithstanding the foregoing and solely with respect to applicants seeking relief with respect to the VFC Program other than through the SC Component, Section IV.A. and IV.B.

shall not apply to a transaction described in Section I.A., provided that: (1) the applicant under the VFC Program has met all of the other applicable Program requirements; (2) the amount of the excise tax that otherwise would be imposed by Code section 4975 with respect to any transaction(s) described in Section I.A would be less than or equal to \$100; (3) the amount of the excise tax that otherwise would be imposed by Code section 4975 was paid to the plan and allocated to the individual accounts of participants and beneficiaries in the same manner as provided under the plan with respect to plan earnings; and (4) the applicant under the VFC Program provides a copy of a completed IRS Form 5330 or written documentation containing the information required by IRS Form 5330 and proof of payment with the submission of the application to the appropriate EBSA Regional Office. For the sole purpose of determining whether the excise tax due under Code section 4975 on the “amount involved” with respect to the prohibited transaction involving the failure to timely transmit participant contributions and loan repayments is less than or equal to \$100, an applicant may calculate the excise tax due based upon the Lost Earnings amount computed using the online calculator provided under the Program.

D. Notwithstanding the foregoing and solely with respect to self-correctors seeking relief with respect to transactions corrected pursuant to the SC Component of the VFC Program, Section IV.A. and B. shall not apply, and additionally the self-corrector must: (1) pay to the plan the amount of the excise tax that otherwise would be imposed by Code section 4975 and allocate such amount to the individual accounts of participants and beneficiaries in the same manner as provided under the plan with respect to plan earnings, and (2) retain a copy of a completed IRS Form 5330 or written documentation regarding the determination of the otherwise applicable excise tax and proof of payment of the amounts paid to the plan pursuant to the VFC Program and this exemption and (3) provide to the plan administrator a copy of such documentation. Self-correctors must calculate the excise tax otherwise due based upon the Lost Earnings amount computed using the online calculator provided under the Program.

*Section V. Definitions*

A. For purposes of this exemption the term “affiliate” of a person means-

- (1) any person directly, or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;
- (2) any officer, director, partner, employee, member of the family (as defined in Code section 4975(e)(6)) of the person; or
- (3) any corporation or partnership of which such person is an officer, director, partner or employee.

B. For purposes of this Section V, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, D.C., this 7th day of November, 2022.

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

## Appendix – Model Notice to Interested Persons

Dear [Participant or Beneficiary],

The purpose of this letter is to notify you that the [Insert Name of Applicant] is participating in the U.S. Department of Labor’s Voluntary Fiduciary Correction (VFC) Program with respect to the [Insert Name of Plan]. The VFC Program is a voluntary enforcement program that encourages the correction of possible breaches of Title I of the Employee Retirement Income Security Act (ERISA).

ERISA is the federal law that covers most employee benefit plans in the private sector. The U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) enforces many parts of ERISA. If the terms and conditions of the VFC Program are met by [Insert Name of Applicant], EBSA will not initiate a civil investigation under Title I of ERISA with respect to the transaction and voluntary correction described below.

The VFC Program is accompanied by a “class exemption” from certain excise taxes imposed under the Internal Revenue Code on parties participating in “prohibited transactions” as defined in ERISA and the Code. The purpose of the prohibited transaction rules is to prevent dealings with persons or entities that may be in a position to exercise improper influence over employee benefit plan assets including [Name of the Plan]. If the terms of the class exemption are met, [Insert Name of Applicant] will qualify for relief from the excise taxes that would otherwise apply.

One of the requirements for excise tax relief is for [Insert Name of Applicant] to provide you with this notice so you have an opportunity to provide comments to EBSA about the prohibited transaction and the steps taken to correct the prohibited transaction, both of which are described below. To the extent that you are interested in providing your written comments to EBSA, you may mail them to [Insert the Name of the Appropriate EBSA Regional Office from the VFC Program Notice, Appendix C]. The written comments should be made to the attention of the “VFC Program Coordinator.” The address and telephone number for this office are [Insert from VFC Program Notice, Appendix C]. You have 30 calendar days, beginning on the date this notice was distributed, to provide written comments. Individuals submitting written comments on this matter are advised not to disclose sensitive personal data such as social security numbers.

[Insert An Objective Description of the Transaction and the Steps Taken to Correct the Transaction]

Please feel free to contact me if you have any questions at [Insert Telephone Number of a Person Employed by the Applicant Who Is Knowledgeable About this Matter].

Sincerely,

[Insert Name and Title of Person Employed by the Applicant]

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