
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Chapter 34, 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.

More specifically, the purpose of the voluntary compliance guidelines is to provide guidance to EBSA field offices as to situations (1) which are appropriate for attempts at voluntary compliance and (2) where they are authorized to proceed without prior consultation with OE/DFO. The guidelines also detail a procedure for securing OE/DFO approval for voluntary compliance attempts. In addition, the guidelines provide instructions as to acceptable terms of settlement in cases where voluntary compliance is sought.

2. **Review of Guidelines.** Although attempting to be comprehensive, these guidelines will not make clear in every situation whether voluntary compliance efforts are appropriate. Therefore, the field is encouraged to consult with OE/DFO on an as-needed basis. Moreover, these guidelines represent the current view of appropriate circumstances for voluntary compliance. OE will periodically review suggestions from the field to determine whether these guidelines should be amended in light of the field's experience.

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

a. RDs 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 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 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.

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.

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

6. **Types of Cases in Which Voluntary Compliance May Not Be Appropriate.** Voluntary compliance may not be suitable in cases involving novel or interpretive legal issues or cases which involve complex fiduciary violations.

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.

7. **Action to be Taken at the RO Level Prior to Pursuing Voluntary Compliance.** The RD is responsible for ensuring that matters pursued through voluntary compliance meet the guidelines in this chapter. Further, it is the responsibility of the RD to ensure that violations are fully documented and that the position taken in the voluntary compliance (VC) notice letter is appropriate. The method of accomplishing this is left to the discretion of the RD.

If the RO requires assistance in determining the proper disposition of a case, it should refer the matter to OE/DFO. These referrals may, at the RD's discretion, take the form of

a telephone consultation or a detailed memorandum. In the latter case, a proposed VC notice letter may be attached.

8. **VC Notice Letter.**

a. **VC Notice Letter.** 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 4, 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. **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 settlement less favorable than the following:

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 (6) months after the repayment period terminates;

b. Interest on repayments should be at appropriate rates; and

c. All notes must be adequately secured.

^{1/} If the correction involves a repayment period, the RO must use either PTE 94-17 or obtain a consent order.

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:

- d. 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);
- e. A worksheet indicating how the applicable recovery amount was determined and how the 502(l) penalty was computed;
- f. Proof that payment of the applicable recovery amount was actually made to the plan;
- g. A copy of the Settlement Agreement; and
- h. 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)] (Figure 3) 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).^{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

^{2/} ERISA Section 406(a)(2) violation was not included in the publication of the final exemption; therefore, a correction notice dated 11/28/94 (59 FR 60837) was issued.

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^{3/};

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 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.

^{3/} Settlements may still be approved for cases not otherwise meeting voluntary compliance guidelines, after RO consultation with OE. See paragraphs 10 b and c below.

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- 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 transactions(s) and of the opportunity to comment on the proposed transaction(s) (Figure 5).

The written notice must meet the following conditions:

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- 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/}
 - 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.

g. **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 2560.5021-1(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

^{4/} In certain limited situations, other methods may be appropriate, depending on the size of the plan and assurances by the applicant that all interested plan participants will be notified through their proposed notice methodology. For example, in large plans a number of methods may be used, often in combination, including electronic mail, posting notices where other important employee messages are posted, and publication in the employee newsletter. It is the applicant's responsibility to establish that notice was provided to all interested parties.

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.

12. **Procedures for Assessing the 502(l) Penalty.** When the RO has determined that a settlement agreement has been effected, the RO should prepare and issue a 502(l) assessment letter.

The regulations require that the assessment letter contain the following information:

- a. A brief factual description of the violation for which the assessment is being made;
- b. The identity of the person being assessed;
- c. The amount of the assessment; and
- d. The basis for assessing that particular person that particular penalty amount. (See Chapter 35)

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 8 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 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, 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, 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(l) 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 reporting violation has been found.

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.

16. SBREFA Notice. In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Small Business Regulatory Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small businesses. If a small business wishes to comment on the enforcement actions of EBSA, it may call 1-888-REG-FAIR (1-888-734-3247) or write to the Ombudsman at 409 3rd Street SW, MC 2120, Washington, DC 20416.

Notice of the right to comment to the SBREFA Ombudsman will be provided by copy of the EBSA Customer Service Standards pamphlet to all plan sponsors, plans, or plan service providers with fewer than 100 participants or employees during the course of ERISA Title I civil investigations. Discretion is granted to EBSA Regional Directors regarding the timing of the delivery of the pamphlet/notice on a case by case basis. The case file must reflect appropriate documentation of the SBREFA notice.

The right to file a comment with the Ombudsman does not affect EBSA's authority to enforce or otherwise seek compliance with ERISA. The filing of a comment by a small business with the Ombudsman is not a substitute for complying with an EBSA subpoena or addressing EBSA's proposed corrective action in a timely manner to protect business' interests.

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SAMPLE VC NOTICE LETTER

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Name
AddressRe: 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.

(Figure 1)

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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 and the losses may be restored to the Plan.

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.^{1/} 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.^{2/} 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.

^{1/} In situations where 502(i) issues are involved, this paragraph should be revised as follows:
[If you take proper corrective action the Department will not bring a lawsuit with regard to these issues, but may assess a civil penalty under section 502(i) of ERISA. Furthermore, section 502(l)...]

^{2/} The Department may, in its sole discretion, waive or reduce the penalty if it determines in writing that the fiduciary or knowing participant in the breach acted reasonably and in good faith, or if it is reasonable to expect that the fiduciary or knowing participant will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted. The Department may, in its sole discretion, agree to such a waiver or reduction in conjunction with entering into a settlement agreement. The procedure for applying for a waiver or reduction of the civil penalty is set forth in an interim regulation promulgated by the Department at 29 C.F.R. 2570.80 to 2570.88. A petition for a waiver or reduction of the civil penalty should be directed to the Regional Office. The Department has also issued a proposed regulation regarding implementation of the civil penalty at 29 C.F.R. 2560.5021-1.

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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

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SAMPLE 502(l) 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.

(Figure 2)

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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:

Regular U.S. Mail

U.S. Department of Labor
ERISA Civil Penalty
P.O. Box 70942
Charlotte, NC 28272-0942

For overnight courier the address is:

U.S. Department of Labor
QLP Wholesale Lockbox - NC0810
Lockbox # 70942
1525 West WT Harris Blvd
Charlotte, NC 28262

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.

[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

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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)".^{1/}

Sincerely,

Regional Director

Enclosures: Letter dated from Regional Director to _____ (voluntary compliance notice letter)
"Procedures Under ERISA Section 502(l)"

bcc: OE, OPPEM

^{1/} Include language in brackets when addressee is or represents the disqualified person involved in the prohibited transaction.

PROCEDURES UNDER ERISA SECTION 502(1)

A. THE CIVIL PENALTY UNDER ERISA SECTION 502(1)

Section 502(1) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(1), 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(1) is equal to 20 percent of the applicable recovery amount.

In this regard, the Secretary of Labor has delegated to EBSA most of the Secretary's responsibilities under ERISA.

An interim regulation implementing section 502(1) was published effective June 20, 1990 [55 Fed. Reg. 25,284 (1990) (to be codified at 29 C.F.R. Part 2570)]. In addition, a proposed substantive regulation has been published for notice and comment [55 Fed. Reg. 25,288 (1990) (to be codified at 29 C.F.R. Part 2560)].

B. HOW TO PETITION FOR WAIVER OR REDUCTION OF THE CIVIL PENALTY

1. **Your Petition**

You will receive a notice of assessment of the 502(1) civil penalty in the form of a letter from EBSA. You have 60 calendar days from the date of the notice of assessment to pay the assessed civil penalty. 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 provided in the statute, on the basis that: (1) you acted reasonably and in good faith in engaging in the breach or violation; or (2) you 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. A petition to waive or reduce must be in writing and must contain the following information:

- (1) The name of the petitioner;
- (2) A detailed description of the breach or violation which is the subject of the penalty;
- (3) A detailed recitation of the facts which support one, or both, of the bases for waiver or reduction, accompanied by underlying documentation supporting such factual allegations; and,
- (4) A declaration signed and dated by the petitioner(s), in the following form: Under penalty of perjury, I declare that, to the best of my knowledge and belief, the representations made in this petition are true and correct.

If your petition is based, in whole or in part, on financial hardship, it would be helpful in the consideration of your petition if you would provide financial information such as your Federal income tax returns for the last two years and a notarized financial statement.

As a general matter, in determining whether a fiduciary or knowing participant acted reasonably and in good faith, EBSA will examine the decision making process with respect to the transaction in question to determine whether it was designed to adequately safeguard the interest of the participants and beneficiaries of the plan. In the absence of such decision making process, actual favorable investment return to the plan will not provide a sufficient showing that a person acted reasonably and in good faith with regard to a particular transaction. You may wish to refer to ERISA Technical Release Number 85-1 for general guidelines concerning the Department's previously articulated views concerning evidence of good faith. This release can be found in the current edition of Prentice-Hall's Pension and Profit Sharing loose-leaf service, paragraph 110,735.

2. How Your Petition is Processed

If your petition for waiver or reduction is based on financial hardship, a determination of whether to reduce or waive the penalty on this basis will be made by the EBSA Regional Director who originally assessed the civil penalty. If your petition is based on good faith, the Regional Director will forward your petition to EBSA's Office of Exemption Determinations in Washington, D.C., where the decision will be made whether to reduce or waive the penalty on the basis of good faith. If your petition is based both on financial hardship and good faith, your petition will first be considered by the Regional Director, and will be forwarded to the Office of Exemption Determination only if the petition is denied on the basis of financial hardship.

Should a decision be made to deny either petition, in whole or part, you are entitled to a conference with the Department to discuss the factual allegations contained in each petition. Any additional conferences, however, are at the discretion of the Department.

You will be served with a written determination informing you of the decision made on your petition. This written determination will briefly state the grounds for the decision. As provided in ERISA section 502(1), this decision is final and neither reviewable nor appealable. In the case of a determination not to waive, the payment period for the penalty will resume as of the date of service of the written determination.

C. EXCISE TAX UNDER INTERNAL REVENUE CODE 4975

1. What is the Excise Tax?

When Congress enacted ERISA, it 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

(Figure 2)

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 (Form and Instructions attached).

2. Offset Procedures

Any penalty assessed under ERISA section 502(l) with regard to any particular transaction will be reduced by the amount of any excise tax paid by you with respect to such transaction under section 4975 of the Internal Revenue Code, exclusive of any interest or penalties paid thereon. Prior to such a reduction, you must provide proof to EBSA of your payment of the excise tax and the amount of such payment. The offset applies only to payments actually made, and does not apply to mere assessments; thus, submissions of proof of your tax assessment will not toll the 60-day payment period for ERISA section 502(l).

If, based on information gained through submission of proof of excise tax payment, EBSA determines that a previously issued notice of assessment should be revised, EBSA will issue a revised notice of assessment, and you will be obligated to pay the revised assessed penalty within the relevant 60 day period and, where necessary, any excess penalty payment will be refunded as soon as administratively feasible.

D. THE CIVIL PENALTY UNDER ERISA SECTION 502(i)

1. What is the Civil Penalty Under ERISA Section 502(i)?

Section 502(i) of ERISA authorizes the Secretary of Labor to impose upon a party in interest a civil penalty of 5 percent of the amount involved in connection with a prohibited transaction with a health and welfare plan or a non-qualified pension plan. If the prohibited transaction is not corrected within 90 days, a penalty of 100 percent may be imposed.

2. Offset Procedures

Any penalty assessed under ERISA section 502(l) with regard to any particular transaction will be reduced by the amount of any penalty paid by you with respect to such transaction under ERISA section 502(i). Prior to such a reduction, you must provide proof to EBSA of your payment of the penalty and the amount of such payment. The offset applies only to payments actually made, and does not apply to mere assessments; thus, submissions of proof of your penalty assessment will not toll the 60-day payment period for ERISA section 502(l).

If, based on information gained through submission of proof of penalty payment, EBSA determines that a previously issued notice of assessment should be revised, EBSA will issue a revised notice of assessment, and you will be obligated to pay the revised assessed penalty within the relevant 60 day period and, where necessary, any excess penalty payment will be refunded as soon as administratively feasible.

DEPARTMENT OF LABOR

Employee Benefits Security Administration
[Prohibited Transaction Exemption 94-71;
Application No. D-9484]

Grant of Class Exemption to Permit Certain Transactions Authorized Pursuant to Settlement
Agreements Between the U.S. Department of Labor and Plans

Agency: Employee Benefits Security Administration

Action: Grant of Class Exemption

Summary: This document contains a final exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The class exemption applies to certain prospective transactions involving employee benefit plans where such transactions are specifically authorized by the Department pursuant to a settlement agreement. The exemption affects plans, participants and beneficiaries of such plans, and certain individuals engaging in such transactions or activities.

For further information contact: Eric Burger, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (202) 219-8971 (not a toll-free number); or Vicki Shteir-Dunn, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor (202) 219-8610 (not a toll-free number).^{1/}

Supplementary Information: On May 27, 1994, the Department of Labor (the Department) published a notice in the Federal Register (59 FR 27581) of the pendency of a proposed class exemption from the restrictions of section 406(a)(1)(A) through (D), 406(a)(2), 406(b)(1) and 406(b)(2) of ERISA and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code.

The Department proposed the class exemption on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).^{2/}

The Notice gave interested persons an opportunity to submit written comments or requests for a

^{1/} Mr. Berger no longer works for the Department. For questions, please contact Allison Padams-Lavigne at (202) 693-8564.

^{2/} Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

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hearing on the proposed exemption to the Department. No public comments and no requests for a public hearing with respect to the proposed class exemption were received by the Department. Upon consideration of the record as a whole, the Department had determined to grant the class exemption as proposed.^{3/}

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 section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or 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 expressly apply and the general fiduciary responsibility provisions of section 404 of ERISA. Section 404 requires, in part, that a fiduciary discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA. This exemption does not affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) The exemption will not extend to transactions prohibited under section 406(b)(3) of ERISA and section 4975(c)(1)(F) of the Code.

(3) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interest of plans and of their participants and beneficiaries and protective of the rights of the participants and beneficiaries of such plans.

(4) The exemption is 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) The exemption is applicable to a transaction only if the conditions specified in the class exemption are satisfied.

Exemption

Accordingly, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

^{3/} The Department notes that the exemption will not affect the liability of any person for the civil penalties imposed on applicable recovery amounts under section 502(l) of ERISA.

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Effective as of October 7, 1994, the restrictions of section 406(a)(1)(A) through (D), 406(a)(2), 406(b)(1) and 406(b)(2) of ERISA and the taxes imposed by section 4975(a) and 4975(b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to a transaction or activity which is authorized, prior to the occurrence of such transaction or activity, by a settlement agreement resulting from an investigation of an employee benefit plan conducted by the Department under the authority of section 504(a) of ERISA provided that:

- (A) The nature of such transaction or activity is specifically described in writing, by the terms of such settlement agreement.
- (B) The Department of Labor is 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 that is reasonably calculated to result in the receipt of such notice at least 30 days prior to entry into the settlement agreement.
- (D) A copy of the notice and the method of distribution is approved in advance by the area or district office of the Department which negotiated the settlement.
- (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 Department which negotiated the settlement agreement, and a statement apprising the participants and beneficiaries of their right to forward their comments to such office.

Signed at Washington, DC, this 30th day of September 1994.

ALAN D. LEBOWITZ
Deputy Assistant Secretary of
Program Operations
Employee Benefits Security Administration
U.S. Department of Labor

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: 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 _____. (Figure 6)
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

(Figure 4)

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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 his 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 entire agreement is null and void.
- 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

(Figure 4)

SAMPLE PTE 94-71 NOTICE TO AFFECTED PARTIES

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code of 1986, as amended, with respect to the proposed [sale of certain real property] held by the

_____ (“the Plan”) to
_____ (“the Company”). In accordance with the notice requirements of Prohibited Transaction Class Exemption 94-71, you are hereby provided with the following information regarding the proposed transaction:

1. Description of Transaction(s).[e.g. the Plan purchased and leased two parcels of real property to . . .];
2. In order to resolve this matter, the company will [provide case-specific information relating to corrected transaction];
3. Approximate date on which Proposed Transaction will occur: [date];
4. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date]. If you may be adversely affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date];
5. Comments concerning this exemption, which may be sent anonymously, should be addressed to: United States Department of Labor, Employee Benefits Security Administration, [Regional Office Address];
6. The Department of Labor will make no decision on the proposed exemption until it reviews all comments received in response to this Notice. If the Department of Labor decides to hold a hearing on the exemption before making its final decision, you will be notified of the time and place of the hearing.

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(1)(2), 29 U.S.C. section 1132(1)(2);

WHEREAS, EBSA has determined that the applicable recovery amount within the meaning of ERISA section 502(1), 29 U.S.C. section 1132(1) 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(1)(2), 29 U.S.C. section 1132(1)(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

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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.^{1/} 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.

[Further, as you may be aware, Section 4975 of the Internal Revenue Code of 1954 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 _____

^{1/} Revise closing letter when the 502(l) penalty has been paid as follows: In addition, in response to my notice of assessment letter of ERISA Section 502(l) civil penalty letter dated _____, you have indicated by letter dated _____ that the required payment was made to the department. Revise closing letter with the 502(l) penalty letter has not been paid as follows: . . .that you have not made the required payment and therefore we are referring this matter for debt collection.

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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 (Form and Instructions 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.^{2/}

Sincerely,

Regional Director

[Enclosures: Explanation sheet on Form 5330
Form 5330
Instructions for Form 5330
SBREFA Notice^{3/}]

bcc: OPPEM (When 502(1) issues are involved)
OE/DFO

^{2/} Include language in brackets when addressee is or represents the disqualified person involved in the prohibited transaction.

^{3/} Include when subject of investigation is a plan, or other business entity, with fewer than 100 participants or employees and when the notice has not been provided previously.

IRS Form 5330 (Return of Initial Excise Taxes
Related to Pension and Profit Sharing Plans)
Filing Information

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 the Utah service center, 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.

<http://www.irs.gov/pub/irs-pdf/f5330.pdf> (form)

<http://www.irs.gov/pub/irs-pdf/i5330.pdf> (instructions)

Any questions you may have on completing the IRS Form 5330 should be directed to:

IRS TE/GE Tax Services
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,]^{1/} no further action by the Department is contemplated at this time.

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). [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.]^{2/}

Sincerely,

Regional Director

Enclosure: SBREFA Notice^{3/}

^{1/} This introduction is to be used when reporting violations were identified during the investigation.

^{2/} To be used when appropriate.

^{3/} When subject of investigation is a plan, or other business entity, with fewer than 100 participants or employees and when the notice has not been provided previously.

SAMPLE CLOSING LETTER

No Action Warranted

Note: 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,]^{1/} We have concluded that further action is not warranted at this time. You are cautioned, however, to refrain from such conduct in the future.

^{1/} This introduction is to be used when reporting violations were identified during the investigation.

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You are further cautioned that this notice addresses only the issues described above. 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.]^{2/}

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 (Form and Instructions 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.]^{3/}

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

Sincerely,

Regional Director

*[Enclosures: Explanation sheet on Form 5330
Form 5330
Instructions for Form 5330
SBREFA Notice^{4/}]

^{2/} To be used when appropriate.

^{3/} Include language in brackets when addressee is or represents the disqualified person involved in the prohibited transaction. See attachments to Figure 3 for material to be enclosed with this letter.

^{4/} Include when subject of investigation is a plan, or other business entity, with fewer than 100 participants or employees and when the notice has not been provided previously.

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,]^{1/} 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.

You are further cautioned that this notice addresses only the issues described above. You must be aware that the responsibility for the acceptance or rejection of any Annual Report (Form

^{1/} This introduction is to be used when reporting violations were identified during the investigation.

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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.]^{2/}

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 (Form and Instructions enclosed).^{3/}

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: Explanation sheet on Form 5330
Form 5330
Instructions for Form 5330
SBREFA Notice^{4/}]

^{2/} To be used when appropriate.

^{3/} Include language in brackets when addressee is or represents the disqualified person involved in the prohibited transaction. See attachments to Figure 6 for materials to be enclosed with this letter.

^{4/} Include when subject of investigation is a plan, or other business entity, with fewer than 100 participants or employees and when the notice has not been provided previously.

SAMPLE CLOSING LETTER

Compliance Not Achieved

[heading]

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)^{1/} as stated in my previous letter.

^{1/} The language in parentheses should be used in situations where the facts have been admitted but their legal significance denied. If only the facts are disputed, this sentence should be (Figure 12)

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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. 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 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.]^{2/}

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 (Form and Instructions enclosed).^{3/}

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.]

omitted.

^{2/} To be used when appropriate.

^{3/} Include language in brackets when the addressee is, or represents the disqualified person involved in the prohibited transaction. See attachments to Figure 8 for materials to be disclosed with this letter.

(Figure 12)

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Sincerely,

Regional Director

*[Enclosures: Explanation sheet on Form 5330
Form 5330
Instructions for Form 5330
SBREFA Notice^{4/}]

^{4/} Include when subject of investigation is a plan, or other business entity, with fewer than 100 participants or employees and when the notice has not been provided previously.

(Figure 12)