

MEMO# 14614

April 5, 2002

DEPARTMENT OF LABOR MODIFIES ITS VOLUNTARY CORRECTION PROGRAMS FOR RETIREMENT PLANS

[14614] April 5, 2002 TO: PENSION MEMBERS No. 13-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 21-02 RE: DEPARTMENT OF LABOR MODIFIES ITS VOLUNTARY CORRECTION PROGRAMS FOR RETIREMENT PLANS The Department of Labor recently modified two of its voluntary correction programs for employer-sponsored retirement plans: (1) the Voluntary Fiduciary Correction ("VFC") program established in March 2000,¹ which allows plan officials to voluntarily correct certain transactions that may give rise to a fiduciary breach and avoid possible civil investigation by DOL, and (2) the Delinquent Filer Voluntary Compliance ("DFVC") program,² which provides procedures under which plans may address noncompliance with ERISA's reporting requirements. VFC Program. Under the VFC program, plan officials or other parties to the transaction in question may voluntarily correct and seek relief for violations covered by the program. Specifically, applicants must correct the fiduciary breach, calculate and restore any losses, and distribute supplemental benefits owed to eligible participants and beneficiaries. If the program requirements are met, the applicant would receive a "no action" letter indicating that there will be no further enforcement action by DOL on the corrected transaction.³ 1 See Institute Memorandum to Pension Members No. 18-00 and Pension Operations Advisory Committee No. 19-00, dated March 21, 2000. 2 See Institute Memorandum to Pension Members No. 26-95, dated May 1, 1995; Institute Memorandum to Pension Members No. 15-01 and Pension Operations Advisory Committee No. 22-01, dated March 5, 2001. 3 The Institute submitted a comment letter making a number of recommendations regarding the interim VFC program established in March 2000. The letter requested that the Department (1) enhance coordination with the IRS to address Code section 4975 excise taxes and assure remedies under VFC are consistent with those acceptable under the IRS' voluntary correction program (EPCRS); (2) modify the program's notice requirement; (3) coordinate relief under VFC with the Solicitor of Labor; (4) modify VFC's requirement relating to the provision of supporting documentation; (5) modify and expand permissible calculation methods for determining correction amounts under the program; (6) permit anonymous applications under VFC and expressly permit pre-application discussions with DOL; and (7) establish a self-correction component to the program analogous to the IRS' APRSC program (now part of EPCRS). See Institute Memorandum to Pension Committee No. 35-00, Pension Operations Advisory Committee No. 35-00 and Ad Hoc Committee on DOL Voluntary Correction Program, dated May 18, 2000. 2 While the general structure of the VFC program is essentially unchanged, the revised program has been expanded in a number of respects. The revised program, among other things: • provides limited relief from the excise tax imposed under Code section 4975 on prohibited transactions that may arise with regard to

certain transactions covered by the VFC program; in this regard, DOL — in the form of a class exemption from the prohibited transaction rules — and the IRS — in the form of a notice — issued excise tax relief with respect to a subset of transactions eligible for correction under the VFC program⁴; • eliminates the requirement that notice be provided to participants of the possible breach and the corrective action taken (which had been required under the interim guidance) — unless excise tax relief is sought under the class exemption issued by DOL⁵; • establishes a “de minimis” exception similar to that provided in IRS Revenue Procedure 2001-176 for certain corrective distributions; • simplifies the “documentation” requirements relating to VFC submissions by permitting applicants to provide (1) a statement that they have a fidelity bond (rather than a copy of the bond itself) and (2) the relevant portions of a plan document (rather than the entire plan document); • provides some flexibility in calculating corrective earnings by allowing the use of a “blended” rate of return for affected participants who have not made any investment allocations⁷; and 4 The four eligible transactions are (1) the failure to transmit participant contributions to a pension plan in a timely manner; (2) the making of a loan by a plan at a fair market interest rate to a party in interest with respect to a plan; (3) the purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value; and (4) the sale of real property to a plan by the employer and the leaseback of such property to the employer, at fair market value and fair market rental value, respectively. 5 While the VFC program itself no longer requires notice to participants of the possible breach/correction, applicants that seek excise tax relief must satisfy the notice requirement described in the new class exemption, under which an applicant must provide interested persons (such as participants and beneficiaries) an objective description of the transaction and the steps taken to correct it. 6 See Institute Memorandum to Pension Members No. 5-01, Pension Operations Advisory Committee No. 9-01 and Ad Hoc Committee on IRS Group Correction Program, dated January 26, 2001 (providing guidance on the IRS’ EPCRS program). Thus, where correction under the VFC program requires distributions of less than \$20 per individual and the applicant demonstrates in its submission that the cost of making the distribution exceeds the cost of correction, the applicant need not make distributions to those individuals who have separated from the plan and who would receive less than \$20 as a result of the correction. 7 Where participants have made elections, however, the applicant still would be required to calculate the actual rate of return or use the investment with the highest rate of return among the investment alternatives available to the participants. 3 • adds “delinquent participant contributions to insured welfare plans” and “delinquent participant contributions to welfare plan trusts” as transactions eligible for correction under the program. Notably, the revised VFC program does not allow anonymous submissions and does not provide a “self-correction” program. The DOL guidance, however, provides that members of the public are free to contact the VFC program coordinator in each DOL regional office to discuss on any informal, hypothetical basis general issues regarding the scope of the VFC program, including the types of transactions appropriate for the program and the types of correction methods that would satisfy the program. Finally, the revised VFC program is effective April 29, 2002. DFVC Program. The revised DVFC program incorporates several changes designed to encourage voluntary compliance with ERISA’s reporting requirements. In particular, the revised DVFC program reduces the civil penalty assessed on the failure to file a timely annual report and includes a per-plan cap on civil penalties. The revised program also provides additional flexibility with regard to the corrective annual returns required to be filed for each plan year for which relief is sought.⁸ The revised program is effective as of March 28, 2002. Written comments on the program must be received by DOL no later than May 28, 2002. Copies of the following documents are attached for your review: (1) the revised VFC program guidance, (2) the DOL class exemption providing

excise tax relief; (3) the IRS notice providing excise tax relief, (4) the revised DFVC program guidance, and (5) “fact sheets” published by DOL on both the VFC and DFVC programs. Thomas T. Kim Associate Counsel Note: Not all recipients receive the attachments. To obtain copies of the attachments, please visit our members website (<http://members.ici.org>) and search for memo 14614, or call the ICI Library at (202) 326-8304 and request the attachments for memo 14614. Attachment no. 1 (in .pdf format) 8 Notably, in Notice 2002-23, the IRS stated that it will not impose penalties under section 6652(c)(1), (d), (e), and 6692 (as they relate to the filing of Form 5500) on a person who satisfies the requirements of the DVFC program.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.