

Reduced Penalties for DFVC Program

November 13, 2000

Leslie B. Kramerich
Acting Assistant Secretary of Labor
Pension and Welfare Benefits Administration
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Reduced Penalties for DFVC Program

Dear Ms. Kramerich:

The American Society of Pension Actuaries ("ASPPA") submits these comments on the Delinquent Filer Voluntary Compliance program ("DFVC"). ASPPA is a national organization of approximately 4,000 members who provide actuarial, consulting, administrative, legal and other professional services for about one-third of the qualified retirement plans in the United States, the majority of which are maintained by small businesses. ASPPA's mission is to educate pension actuaries, consultants, administrators and other benefits professionals and to preserve and enhance the private retirement system as part of the development of a cohesive and coherent national retirement income policy. Its large and broad based membership gives it unusual insight into current practical problems with ERISA and qualified retirement plans, with a particular focus on the issues faced by smaller employers.

ASPPA fully supports the efforts of the Department to develop innovative programs designed to facilitate compliance with the many and detailed requirements of ERISA. The recently issued Voluntary Fiduciary Correction program is a good example of a program that balances the need of the Department to enforce the law with encouraging plan sponsors and fiduciaries to voluntarily correct deficiencies. DFVC is another such program that was well received by the pension community upon its original issuance in 1995. ASPPA believes, however, that it is now time to revise DFVC so that voluntary compliance in the filing of delinquent Forms 5500 can be increased.

It has been the experience of ASPPA members, many of whom prepare numerous Forms 5500 for filing by their clients, that most failures to timely file are due to an inadvertent error by the administrator. Sometimes these failures to file are caught by the administrator and can be quickly corrected. However, oftentimes they are not uncovered until the administrator engages a different service provider or changes human resources personnel if the returns are generated internally. Thus, when there is a problem, it may go undetected for several years.

ASPPA supports DFVC because it permits and encourages an ERISA plan administrator to come forward and file a delinquent return without imposition of the entire statutory penalty. It is the observation and belief of ASPPA that when an administrator discovers that it has failed to file a required return, the administrator wishes to correct the deficiency. However, ASPPA also believes that the penalties under DFVC, although reduced from the maximum possible amount, are still too high to effectively encourage voluntary compliance to correct the deficiency.

The main purpose of requiring the filing of Forms 5500 is to gather information regarding the plans and not to assess penalties. ASPPA also realizes that the penalty can deter administrators and practitioners from ignoring filing deadlines. We believe that significantly lower penalties under DFVC would encourage administrators to correct delinquent filings of 5500s but would not have a negative effect on timely future filings.

Accordingly, we recommend that the DFVC penalties for late filings be revised as follows: For filings that are late by 12 months or less, the penalty should be reduced from \$50 per day to \$10 per day with the maximum penalty reduced from \$2500 to \$250 for a large plan (100 or more participants) and reduced from \$1000 to \$100 for a small plan. For filings that are late by more than 12 months, the penalty should be reduced from \$5000 to \$500 for a large plan and reduced from \$2,000 to \$200 for a small plan.

As responsibility for receiving Forms 5500 shifts from the Internal Revenue Service to the Department of Labor,

we believe this is an excellent opportunity to implement lower DFVC penalties and encourage administrators and practitioners to rectify past failures to file. In addition, we believe the Department should establish a procedure under DFVC whereby no penalties would be required if the administrator makes an adequate showing of reasonable cause for the late filing.

Finally we would like to encourage expansion of the DFVC program to provide for coordination between the Department and the Internal Revenue Service in resolution of delinquent filing penalties. We believe that one reason there has not been more use of the DFVC program is that it only resolves penalties with the Department.

These comments are filed on behalf of ASPPA's Governmental Affairs Committee and were written principally by Michael Canan and R. Bradford Huss.

If you have any questions with regard to this matter, please feel free to address them to any of the undersigned.

Very truly yours,

Michael J. Canan, APM,
Department of Labor Subcommittee

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